Supreme Court of the United States

OCTOBER TERM, 1970

No. 910

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1, PETITIONER

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION AND NATIONAL LABOR RELATIONS BOARD, RESPONDENTS

No. 961

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION AND ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1, RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

IN THE MATTER OF: ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1 AND PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION

8–CA–4202

4/12/66	Charge Filed
11/22/66	Amended Charge Filed
11/22/66	Regional Director's Complaint and Notice of Hearing Issued
11/30/66	Company's Answer to Complaint
1/17/67	Hearing Opened
1/17/67	Hearing Closed
4/14/67	Trial Examiner's Decision Issued
5/29/67	Union's Exceptions Filed
5/31/67	Company's Exceptions Filed
6/ 1/67	General Counsel's Exceptions Filed
7/ 9/69	Decision and Order Issued by the National Labor Relations Board
9/23/69	Company's Petition for Review Filed
10/ 8/69	Court's Order Entered Granting Union Motion to Intervene
10/31/67	Board's Cross-Application for Enforcement and Certified List Filed
4/ 6/70	Oral Argument Held
6/10/70	Court's Opinion Issued
7/ 6/70	Board's Petition for Rehearing and Suggestion for Rehearing en banc Mailed
7/31/70	Court's Order Entered Denying Board's Petition for Rehearing
8/11/70	Mandate Issued
10/16/70	Order of Mr. Justice Stewart Extending Board's Time for Filing Petition for Certiorari
10/30/70	Union's Petition for Certiorari Filed
11/12/70	Board's Petition for Certiorari Filed
2/22/71	Supreme Court's Order Granting Union's and Board's Petitions for Certiorari

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

Case No. 8-CA-4202

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION and LOCAL UNION NO. 1, ALLIED CHEMICAL AND ALKALI WORKERS OF AMERICA

Complaint and Notice of Hearing

It having been charged by Local Union No. 1, Allied Chemical and Alkali Workers of America, herein called the Union, that Pittsburgh Plate Glass Company, Chemical Division, herein called the Respondent, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151 et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for the Eighth Region, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. (A) The original charge herein was filed by the Union against the Respondent on April 12, 1966, and a copy thereof was served upon Respondent by registered mail on April 13, 1966.

(B) An amended charge was filed by the Union against Respondent on November 22, 1966, service by registered mail being made upon Respondent simultaneously with the service of this Complaint.

2. Respondent is now, and has been at all times material herein, a corporation duly organized and existing by virtue of the laws of the State of Pennsylvania, with its main office located in Pittsburgh, Pennsylvania. Respondent is en-

gaged in the manufacture and sale of glass and glass products at various plants in the United States. At its Barberton, Ohio, plant, which is the only facility involved herein, Respondent produces various chemicals used in the manufacture of glass. Annually, Respondent ships goods valued in excess of $50,000 from its Barberton, Ohio, plant to points located outside the State of Ohio.

3. Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

5. The following employees at Respondent's Barberton, Ohio, plant constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All hourly rated employees employed at the Respondent's Barberton, Ohio, plant, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

6. (A) Commencing on or about January 1, 1949, and including all times material herein, the Union has been the representative for the purposes of collective bargaining of the employees in the unit described above in Paragraph 5, and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(B) Commencing on or about January 1, 1949, and continuing to date, the Respondent and the Union have engaged in collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of

employment, concerning the employees in the unit described above in Paragraph 5, including retired employees, and on or about October 20, 1964, entered into a collective bargaining agreement covering said unit, which expires October 19, 1967, and said collective bargaining agreement remains in full force and effect.

7. On or about March 21, 1966, Respondent announced a proposed plan affecting the rights of retired employees to participate in the hospital and medical insurance plans provided for by collective bargaining agreements between Respondent and the Union

8. Commencing on or about March 21, 1966, and continuing thereafter, the Union has requested, and is requesting, Respondent to bargain collectively with respect to hospital and medical insurance, and other terms and conditions of employment of the retired employees and the employees of Respondent in the unit described above in Paragraph 5.

9. On or about March 24, 1966, the Respondent, without giving the Union an opportunity to bargain, unilaterally instituted a plan which altered the rights of retired employees to participate in hospital and medical insurance provided for by collective bargaining agreements between Respondent and the Union.

10. Commencing on or about March 24, 1966, and continuing thereafter, Respondent did refuse, and continues to refuse to bargain collectively with the Union as the collective bargaining representative of all the employees in the unit described above in Paragraph 5, including retired employees, in that Respondent has refused, and continues to refuse to return retired employees' hospital and medical insurance plans to the status existing prior to its unilateral action described above in Paragraph 9.

11. By the unilateral acts described above in Paragraph 9, Respondent altered the rates of pay, wages, hours of employment, and other terms and conditions of employment of the employees in the unit described above in Paragraph 5.

12. Commencing on or about March 24, 1966, and continuing thereafter, Respondent, without giving prior notice to the Union, bargained directly and individually with retired employees and with employees in the unit described above in Paragraph 5, concerning rates of pay, wages, hours of employment, hospital and medical insurance, other terms and conditions of employment, and their desire to alter their existing rates of pay, wages, hours of employment, hospital and medical insurance, and other terms and conditions of employment.

13. By the acts described above in Paragraphs 9, 10, 11 and 12, and by each of said acts, Respondent did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby did engage in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

14. By the acts described above in Paragraphs 9, 10, 11 and 12, and by each of said acts, Respondent did refuse to bargain collectively, and is refusing to bargain collectively, with the representative of its employees, and thereby did engage in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act

15. The activities of the Respondent described above in Paragraphs 9, 10, 11, 12, 13 and 14, occurring in connection with the operations of the Respondent described above in Paragraphs 2 and 3, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

16. The acts of the Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 17th day of January, 1967 at 10:00 a.m. Eastern Standard Time, in Court Room No. 5 Ninth Floor, Municipal Building, Akron, Ohio, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Statement of Standard Procedures in Formal Hearing Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

You are further notified that pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an orginal and four (4) copies of an answer to said Complaint within ten (10) days of the service thereof, and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

WHEREFORE, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Complaint and Notice of Hearing to be signed and issued by the Regional Director for Region 8, this 22nd day of November, 1966.

/s/ Philip Fusco
PHILIP FUSCO, *Regional Director*
National Labor Relations Board
Region 8

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

Case No. 8-CA-4202

Answer

Now comes Pittsburgh Plate Glass Company by its attorney and pursuant to Section 10 (b) of the National Labor Relations Act, as amended, 29 U.S.C. Section 151 et. seq., herein called the Act, and Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, files this Answer to the Complaint in the above entitled case.

1. Respondent admits the allegations set forth in paragraphs 1(A), 1(B), 2, 3, 4, 5, and 6(A) of the Complaint.

2. Respondent denies the allegations, and each of them, set forth in paragraphs 6(b), 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 of the Complaint.

Accordingly, the Assistant Counsel of Pittsburgh Plate Glass Company has caused this Answer to the Complaint to be signed and filed this 30th day of November, 1966.

/s/ MARK C. CURRAN
MARK C. CURRAN, *Assistant Counsel*
Pittsburgh Plate Glass Company
One Gateway Center
Pittsburgh, Pennsylvania 15222

CERTIFICATE OF SERVICE

TXD-196-67
Barberton, Ohio

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 8-CA-4202

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION and LOCAL UNION NO. 1, ALLIED CHEMICAL AND ALKALI WORKERS OF AMERICA

RICHARD A. DUROSE, ESQ., for the General Counsel, NLRB

MORTIMER RIEMER, ESQ., Cleveland, Ohio, for Local No. 1, the Charging Party.

MARK C. CURRAN, ESQ., Pittsburgh, Pa., for the Respondent.

Trial Examiner's Decision

STATEMENT OF THE CASE

JAMES V. CONSTANTINE, Trial Examiner: This case is before a Trial Examiner of the National Labor Relations Board upon a complaint issued on November 22, 1966, by the General Counsel of the Board (through the Regional Director for the Eighth Region, at Cleveland, Ohio) pursuant to Section 10(b) of the National Labor Relations Act, herein called the Act. 29 U.S.C. 1960(b). That complaint is based on a charge filed on April 12, and amended on November 22, 1966, by Local Union No. 1, Allied Chemical and Alkali Workers of America, against Pittsburgh Plate Glass Company, Chemical Division, Respondent herein. Essentially, the complaint alleges that Respondent has infringed Section 8(a)(1) and (5) of the Act, and that such conduct affects commerce within the meaning of Section 2(6) and (7) thereof. Respondent has answered, admitting some facts but denying that it perpetrated any unfair labor practices.

Pursuant to due notice this cause came on to be heard before me at Mansfield, Ohio, on January 17, 1967. All parties were represented at and participated in the hearing and were granted full opportunity to introduce evidence, examine and and cross-examine witnesses, submit briefs, and offer oral argument. Respondent's motions to dismiss at the close of the hearing were denied. Briefs of superior excellence have been received from all parties.

This case presents the question of whether an employer has failed to bargain collectively with the majority representative of his employees (a) by unilaterally changing the pension benefits of retired employees provided for in a collective-bargaining contract, and (b) whether the employer's conduct constitutes a unilateral change.

Upon the entire record in this case, and from my observation of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a Pennsylvania corporation, is engaged in manufacturing and selling glass and glass products. From its Barberton, Ohio, plant, which is the only facility involved in this proceeding, Respondent annually ships goods valued in excess of $50,000 to points located outside the State of Ohio. I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction over Respondent in this proceeding.

II. The Labor Organization Involved

Local Union No. 1, Allied Chemical and Alkali Workers of America, herein called Local No. 1 or the Union, is a labor organization within the contemplation of Section 2(5) of the Act.

III. The Unfair Labor Practices

Virtually no dispute exists as to the facts, so that fundamentally an issue of law has been unfolded by the record.

Since January 1949, the Union has been the exclusive representative for the purposes of collective bargaining of the employees of Respondent in a unit composed of

> All hourly rated employees at the Respondent's Barberton, Ohio, plant, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

I find that said unit is appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. Since 1949, Respondent and the Union have negotiated several collective-bargaining contracts, as more fully described below.

In the summer of 1950 the parties negotiated a collective-bargaining contract which, among other things, provided for medical insurance for employees and, for the first time, contained a pension plan. During negotiations the parties agreed orally, but did not incorporate into the contract or otherwise reduce to writing, that retired employees could participate in the above-mentioned medical insurance benefits by paying a stipulated premium. No company contribution was made towards that premium. Such premium was deducted from pension payments. This arrangement as to those on retirement continued without alteration until 1954, when it was unilaterally changed by Respondent. Then the new benefits for retirees remained unchanged until 1960.

In the fall of 1959, during discussions relating to extending their collective-bargaining agreement, the parties bargained for and agreed to modify their pension agreement and the medical insurance benefits of retirees on pension. This change, which went into effect in 1960, granted retired

pensioners an increase in the maximum daily amount of hospitalization benefits. Unlike its predecessor, this agreement concerning medical insurance benefits for retirees was incorporated in a written document. See Company exhibit 1. During the above discussions the Company challenged the Union's right to negotiate pensions and medical insurance programs for employees who had already retired.

Again, in 1962, the parties, while negotiating a new collective-bargaining contract, bargained for and agreed upon certain modifications of Respondent's pension plan, but left intact the medical insurance benefits of pensioners. See General Counsel Exhibit 4 for the Pension Plan. However, Respondent in a separate, contemporaneous understanding, which was embodied in a written instrument, for the first time became obligated to contribute towards the medical insurance premium of any employee who retired on or after June 28, 1962, and who elected to subscribe to such an insurance plan. Such contribution was $2 a month. See General Counsel Exhibit 2 and Respondent Exhibit 5. At the same time the parties also executed a collective-bargaining agreement in still another and distinct document. See General Counsel Exhibit 3.

During negotiations in 1964 for a new collective-bargaining agreement, the parties modified the medical insurance provisions for those already on pension whereby Respondent increased by $2 its contributions toward the cost of premiums for medical insurance for such pensioner, thus contributing $4 a month toward the premium. It was further agreed that this $2 increase would be eliminated by Respondent in the event that "Medicare or a program of Government type insurance" was instituted. See General Counsel Exhibit 5. This modification was in the form of a separate supplement or addendum to a bulky document synchronously adopted as a collective-bargaining contract. See General Counsel Exhibit 6 for the latter contract.

About November 23, 1965, the parties met to discuss certain pending grievances. When their talks upon other sub-

jects were concluded the Union requested Respondent to negotiate a program of insurance which would provide retirees, whether covered by Medicare or not, with benefits not provided by Medicare. At this time Medicare had been passed by Congress to go into effect in 1966. Respondent's labor relations director, John Rodgers, replied that the Company would take this matter under advisement and give the Union an answer "at an appropriate time." Shortly before March 21, 1966, the Union reminded the Company's labor relations supervisor, David Redle, that it had not received a reply to its said request of the previous November; but although Redle professed ignorance thereof, he promised to refer it "to the proper people." He did. Thereafter the Company's officials thoroughly considered it. About March 10, Rodgers called Williams to express the belief that Respondent "would have something" in a week or 10 days.

Then on March 21, 1966, Industiral Relations Director Rodgers asked Vice President Williams of Local No. 1 to meet with Rodgers and Plant Manager Harris at about 3 p.m. They did meet at the appointed time. A committee from the Union accompanied Williams thereat. Asserting that the Company had an answer to the Union's question of the previous November, Rodgers insisted that by virtue of the agreement reached in 1964, Respondent was entitled to "reclaim" $2 of its $4 contribution if a Medicare program was adopted. Continuing, Rodgers observed that Medicare had been enacted and that, beginning July 1, 1966, the Company would "reclaim" $2 a month from each retiree receiving the $4 a month contribution. Further, Rodgers said that Respondent intended to "cancel out" its insurance program for all retirees because Medicare had rendered this feature of retirement benefits practically useless, but added that $3 a month would be paid to such pensioners towards the cost of subscribing to Medicare. This meant an additional $1 a month to those receiving a $2 a month contribution after July 1, 1966, when $2 of the above $4 would be "reclaimed."

Rodgers then commented that the present insurance program for pensioners, among other things, prevented payment of insurance benefits if another group plan paid similar group benefits, and he considered that Medicare qualified as such other group plan.

Union Vice President Williams took issue with Rodgers on this. Although Williams conceded to Rodgers that as a matter of contract the Company was empowered to cease making the extra $2 contribution, Williams insisted that Respondent was not entitled to cancel the insurance of pensioners since it was guaranteed by the agreement of 1964. In addition, Williams contended that the Company was powerless to make such a unilateral change without bargaining with the Union on it because it was a bargainable subject. Finally, Williams posed the question of what Respondent would do for retirees under 65 who were ineligible for Medicare and for all other pensioners, regardless of age, who were not qualified to apply for Medicare. Rodgers replied that Respondent would have to work out a program for such retirees as well as for their wives. Also, Rodgers mentioned that insurance for retirees was optional with them, that the Union had no right to bargain for employees who had retired, and that the Company's bargaining with another union for changes in benefits of persons already retired, to which Williams adverted, involved "a different division under a different management." Williams did not question the assertion of Rodgers that insurance was optional with retirees.

On March 23, 1966, Plant Manager Harris telephoned to Union Vice President Williams that, upon reconsideration, the Company had rescinded its decision to cancel the insurance benefits of pensioners and, instead, would offer each group of retirees by mail an option to cancel or retain their insurance and, to those who chose to cancel, would contribute $3 a month to be used toward the cost of premiums for those electing to be covered by Medicare. (Such letters were sent later, and copies thereof were furnished to Local

No. 1. See General Counsel Exhibit No. 7.) Williams reiterated his position of March 21, 1966, and again demanded that this was a bargainable matter.

On October 11 and 20, 1966, in discussing a new collective-bargaining agreement, the Company twice orally proposed to pay a $3 contribution for those retirees electing to cancel their insurance, in effect reiterating its position taken on March 23, 1966. This was unacceptable to the Union. This proposition was also submitted in writing on October 11, 1966. See General Counsel Exhibit 8, p. 4. The Union rejected it.

No further oral or written communications concerning medical insurance benefits have passed between the parties.

Concluding findings and discussion

In his brief, the General Counsel has vigorously and ably contended that Section 8(a)(5), amplified by Section 8(d), imposes upon an employer a duty to meet and confer with a union with respect to wages, hours, and other terms and conditions of employment, and that this obligation "prohibits unilateral changes in conditions of employment which are mandatory subjects of bargaining or unilateral changes which modify contractual terms or conditions of employment." Of course this accurately portrays the present state of the law. *George E. Light Boat Storage, Inc.*, 153 NLRB 1209, enforced, 64 LRRM 2457 (C.A. 5). It is binding upon me, and I shall follow it to the extent that the facts found herein render it pertinent. Hence, the initial question is to determine whether the record discloses that Respondent has failed to meet and confer with Local No. 1 upon wages, hours, and other terms and conditions of employment regarding employees in the unit heretofore found to be appropriate.

In this connection, I find that pensions and health insurance are mandatory subjects of bargaining with respect to

employees in the unit above described. *Phelps Dodge Copper Corp.*, 101 NLRB 360, 379, and cases there cited; *Inland Steel Co.*, 77 NLRB 1, 170 F. 2d 247 (C.A. 7). And I further find that Respondent did not confer with the Union regarding the proposed changes in the health insurance benefits of retirees as set forth in General Counsel Exhibit 7. While it is true that Respondent had mentioned to the Union that it intended to make such offers to the retirees, it is equally patent that Respondent refused to discuss such proposals with the Union and expressly disagreed with the Union when the latter maintained these were bargainable matters. Hence, I find that Respondent's statements to the Union relative to such announced modifications do not rise to the stature of negotiations embraced by the statutory definition of "to bargain collectively" in Section 8(d) of the Act.

The record is barren of any evidence that Respondent altered, changed or modified unilaterally any pension benefit to be received in the future by employees now in the appropriate unit. Accordingly, the allegations of the complaint alleging such unilateral action have not been sustained, and I shall recommend dismissal of the complaint as to these allegations.

One other matter may be disposed of at this stage of the decision, i.e., the reduction of Respondent's contribution to the insurance premiums from $4 to $2 a month. Since the contract vested this privilege in Respondent—a contention which the Union did not dispute—no refusal to bargain may be based upon Respondent's unilateral reduction of its contribution from $4 to $2 a month. Accordingly, upon this segment of the case no violation of Section 8(a)(5) has been established.

Since I have found that Respondent has refused to meet and confer with the Union regarding changes unilaterally to be made by Respondent, the question is whether such refusal (except as to the lawful decrease of $2 a month described above) constitutes an infringement of Section

8(a)(5) of the Act which enjoins an employer to "bargain collectively with the representatives of his employees." This in turn depends on whether retired persons no longer employed in the unit enjoy the status of employees within the contemplation of Section 8(a)(5) of the Act.

It is my opinion, and I find, that pensioners and retirees are not employees as defined by Section 2(3) of the Act (*Public Service Corporation,* 72 NLRB 224, 230), and therefore, are not employees within the meaning of Section 8(a)(5). Hence, they are not employees in the unit which Respondent represents. Therefore their pensions and other benefits received as retirees and pensioners are not the mandatory subjects of collective bargaining, and Respondent is not under a statutory onus to bargain thereon. While no express Board or court adjudications so hold, certain determinative factors point to this conclusion.

1. In the first place, pensioners patently are not employed in the unit. Not only are they not now employed by Respondent, but they have no reasonable expectation of being reemployed under the terms of Respondent's pension plan Agreement with the Union. Of course I recognize that persons may remain in a unit as employees while not actually employed therein; but in such instances, i.e., when on sick leave, other leave, or layoff status, the conditions of nonemployment contemplate not only a continuation of the employer-employee relationship but also a resumption of or return to work in the predictable future.

And I further acknowledge that in some instances a person not employed in a unit may be treated as an employee for some purposes of the Act. Thus, an applicant for employment (*Phelps Dodge* v. *N.L.R.B.,* 313 U.S. 177), or a registrant at a hiring hall (*Houston Chapter, A.G.C.,* 143 NLRB 409, 412-413), or an independent contractor (*N.L.R.B.* v. *Hearst Publications,* 322 U.S. 111), or a striker (Section 2(3) of the Act), or persons losing jobs upon a change in ownership (*Chemrock Corporation,* 151 NLRB

1074), all have been held to be employees under the Act. But in all these situations a fundamental ingredient—absent in the instant case—has been the reasonable prospect that an employer-employee status was capable of being developed. And cases like *Briggs Mfg., Corp.*, 75 NLRB 569, cited by the Union, are distinguishable, because there the person involved—unlike the pensioners here—was a member of the working class.

However, I am unable to accept Respondent's argument that pensioners may not be treated as employees because they lose their membership in the Union when they retire. This conclusion follows as a corollary of the rule that a labor organization may act as a collective-bargaining representative of employees in a unit regardless of whether it admits such employees to its membership. *F. C. Russell Company,* 115 NLRB 1015 n.5. Therefore, union membership is not a compelling factor on the issue here. Nevertheless, to reject this contention does not alter the result reached herein.

2. Secondly, in comparable situations the Board has considered persons not employed in a unit as not embraced by that unit, even though they formerly may have been part of it. Thus, when employees in a unit are promoted to supervisors they thereby are excluded from the unit and, so long as they retain their supervisory capacity, the bargaining representative of the unit may not as a matter of right require bargaining with respect to them. *Retail Clerks International Association, et al.,* 96 NLRB 581; *N.L.R.B.* v. *Retail Clerks,* 186 F. 2d 371, 31 LRRM 2606, 2609, 203 F. 2d 165 (C.A. 9).

Further, the Board has specifically held that retired persons formerly employed in a unit are ineligible to vote in an election to determine whether a collective-bargaining agent shall represent the employees currently working in that unit. *Taunton Supply Corp.,* 137 NLRB 221, 223; *W. D. Byron & Sons,* 53 NLRB 172, 175. If retired persons are excluded from a unit for the purpose of voting for a repre-

sentative of that unit, manifestly they also should be eliminated from the unit for purposes of collective bargaining relating to employees in that unit.

Upon this aspect of the proceeding, the following situation is not difficult to visualize. Suppose that union A represents the employees in unit X in the plant of an employer, and that union B represents the employees in unit Y of the same employer in the same plant. If employee C transfers from unit X to unit Y, patently union A no longer represents employee C and may not bargain for him because he no longer is employed in unit A. Citation of authority would be supererogatory. Nor may an employer demand that a Union bargain as to units whose employees work for another employer. See *United Mine Workers* v. *Pennington*, 381 U.S. 657, 666-667. Cf. *Local 24* v. *Oliver*, 358 U.S. 283.

A final example suffices. It is not unusual for one union, A, to be displaced as the bargaining representative of a unit by another union, B, or no union. In such instances, while it is true that rights under the contract between union A and the employer may survive even after union A has been replaced by union B or no union (See *John Wiley & Sons, Inc.*, v. *Livingston*, 376 U.S. 543), it is equally true that union A may not insist upon bargaining for employees in the unit. Cf. *L. B. Spear and Company*, 106 NLRB 687, 689; *Retail Clerks* v. *Lion Dry Goods, Inc.*, 369 U.S. 17. See *Southern Conference of Teamsters* v. *Red Ball Motor Freight, Inc.*, 64 LRRM 2545, 2549 (C.A. 5). If material, I find that Local No. 1 herein is not remediless, for I find that, since rights survive under the contract, suit may be brought, either for damages, specific performance, or both, to remedy any breach thereof. Cf. *Modine Mfg. Co.* v. *I.A.M.*, 217 F. 2d 326 (C.A. 6); *McGuire* v. *Humble Oil Co.*, 355 F. 2d 352 (C.A. 2).

3. I find that the pensioners' benefits under the contract are vested and survive the expiration of the contract. *N.L.R.B.* v. *Frontier Homes Corp.*, decided 2/6/67 (C.A. 8);

United Steelworkers of America v. *Porter*, 64 LRRM 2201 (D.C.W.D. Pa.). In my opinion *N.L.R.B.* v. *Cone Mills Corporation* 64 LRRM 2436 (C.A. 4), is distinguishable, for the nature of the rights there involved dissolved with the termination of the contract Additionally, I find that the Union in the instant case at most has demonstrated that Respondent has failed to abide by its obligations under the contract. Of course, a breach of contract does not preclude a finding that Respondent thereby also committed an unfair labor practice. *Smith* v. *Evening News Assn.*, 371 U.S. 195; *C. & C. Plywood* v. *N.L.R.B.*, U.S. , 64 LRRM 2065; *N.L.R.B.* v. *George E. Light Boat Storage, Inc.*, 64 LRRM 2457 (C.A. 5). Nevertheless, a breach of contract is not *per se* an unfair labor practice; and, since the record discloses a breach without more, as found above, I conclude that Respondent's purported unilateral modification of the medical benefits of retirees merely subjects Respondent to an action or suit based upon the contract provisions.

In this area of the case I do not pass upon the question of whether an employer and a union may, by contract, reduce the vested benefits of retirees. Cf. *Upholsterers' Union* v. *American Pad Co.*, 64 LRRM 2200 (C.A. 6). It would seem, however, that fixed rights may not be adversely affected by the parties to a collective-bargaining contract. Thus, I doubt that an employee can be compelled to disgorge some of his wages already received because of subsequent negotiations between the Union and the employer, or that employer contributions actually made to a savings plan may later be withdrawn by agreement between the employer and the Union. In *Oliver Corporation*, 162 NLRB No. 68, the matters sought to be bargained about were not vested and also related to present working conditions; hence, it was not fatal that some of these matters pertained to employees who had already been terminated.

Certain arguments of the General Counsel and the Union deserve comment at this point.

First, they contend that these benefits are part of the overall collective-bargaining contract negotiations and, therefore, affect employees admittedly in the unit. But this means no more than that pensions for employees in a unit are subjects of mandatory collective bargaining, a fact which I have already found and which is not seriously disputed by Respondent. But the question is not whether pensions may be negotiated for employees in the unit; rather, it is whether the Union may bargain for retirees who are no longer employed in the unit. Further, the Union herein may not insist upon bargaining for employees in another unit, such as office clericals, even though (a) some or all of those clericals are transferees from the Unions's hourly rated unit, and (b) the wages and other benefits received by the office clericals manifestly affect employees in the hourly rated unit. Hence, I conclude that this argument is not well taken.

Then again, the argument is pressed that pension benefits are deferred earnings or benefits, and therefore, they constitute mandatory subjects of collective bargaining. It is axiomatic that pensions for employees admittedly in the unit are subjects of mandatory collective bargaining, and I have already so found. *Inland Steel Co.*, 77 NLRB 1, enforced, 170 F. 2d 247 (C.A. 7); *Phelps Dodge Copper Corp.*, 101 NLRB 360, 379. It may also be conceded that pension plans may be classified as deferred earnings or benefits and, as such, are mandatory subjects of collective bargaining when comprehending those employees actually employed in a unit. But this decides nothing, for the question in this case is whether such deferred earnings may be the compulsory subject of further negotiations after those entitled to the same are no longer in the unit and are ineligible to return to the unit. This question must be resolved by ascertaining the status of those receiving the pensions; and, since they do not qualify as employees under Section 2(3) of the Act, Sections 8(a)(5) and 9(a) do not become operative as to them. Accordingly, I find that this contention may not be sustained.

General Counsel also cites, as tending to uphold his position, cases interpreting the word "employees" in Title III of our Act. Apart from the fact that the word "employees" in Title III may sometimes connote different classes from "employees" in Title I (*United States* v. *Ryan*, 350 U.S. 299, 306-307), these cases to which the General Counsel alludes in my opinion do not stand for the proposition that pension benefits actually received by retirees are subjects of compulsory collective bargaining. He refers to *Local 688* v. *Townsend*, 345 F. 2d 77 (C.A. 8); *Blassie* v. *Kroger Company*, 345 F. 2d 58 (C.A. 8); and *Garvinson* v. *Jensen*, 355 F. 2d 487 (C.A. 9). They merely hold that collective-bargaining contracts may lawfully provide that employees who have retired shall enjoy the benefits described in Section 302(c)(5) of the Act, and that such contracts may provide that such individuals shall receive such benefits after they retire and need not restrict benefits to employees working at the time.

But I have already found that the pension benefits to be received by an employee when he retires are subjects of mandatory collective bargaining and that an employer may be held accountable for failure to comply with a contract which contains such provisions. On the other hand, it is desirable again to stress that the issue in the instant case is not whether retirees may be beneficiaries of benefits pursuant to a collective-bargaining contract or whether suit may be instituted if contract clauses providing those benefits are not honored, but instead, the question is whether such benefits are subjects of further mandatory collective bargaining as to those persons who no longer are employed in the unit represented by the Union.

Finally, the General Counsel maintains that medical benefits enjoyed by retirees are subjects of permissive or voluntary collective bargaining within the purview of *N.L.R.B.* v. *Borg Warner Corp.*, 356 U.S. 342, and that, since the parties have voluntarily negotiated an agreement thereon, such agreement may not be unilaterally modified during the term of the contract except by complying with Section 8(d)

of the Act. Upon this aspect of the case I find that the foregoing benefits are subjects of permissive or voluntary bargaining (see *Mill Floor Covering, Inc.*, 136 NLRB 769), and that the parties have a contract or agreement covering them. Additionally, I find that the Board would require the parties to incorporate into a written document the terms of their understanding concerning this permissive subject of collective bargaining. *Associated Building Contractors of Evansville, Inc.*, 143 NLRB 678, 680. It follows, and I further find, that Section 8(d) proscribes mid-term modification of said agreement by unilateral action of either party.

But I am unable to find that Respondent has modified or changed this agreement. Although I find that Respondent wrote to retirees the letters set forth in General Counsel Exhibit 7, I find that such letters do not modify the agreement between Respondent and the Union. Initially, I find that they were not sent to present employees working in the unit. In addition, although the first letter in said series mentions that Respondent will make a $3 a month contribution towards Medicare, it is offered only to pensioners who are not enrolled in any medical plan provided by the collective-bargaining agreement. Hence, no change in the terms of that agreement is discernible in the language of this first letter.

The second, third, fourth, and fifth letters in said series offer retirees an election to accept Medicare or to continue in effect the current medical benefits conferred upon them by the contract between Respondent and the Union. I do not construe these last four letters as modifying said agreement, since employees were free to decline such offer, so that I find that they do not constitute a mid-term change of the contract contemplated by Section 8(d) of the Act. This situation is somewhat analogous that in which an employer offers an employee in one department, represented by a labor organization, an opportunity to transfer to another department, not represented by a union, where wages are different. In this latter event it would seem that, since the

employee is given a choice to retain his present position, the offer of another job at other wages does not amount to a mid-term unilateral change of the collective-bargaining contract.

Upon the basis of the foregoing findings of fact, and upon the entire record in this case, I make the following:

Conclusions of Law

1. Local No. 1 is a labor organization within the meaning of Section 2(5) of the Act.

2. Respondent is an employer within the meaning of Section 2(2), and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Pensions and other benefits to be received by employees in an appropriate unit after they retire are subjects of mandatory collective-bargaining between the employer and the exclusive collective-bargaining agent selected by a majority of such unit.

4. Persons actually retired and receiving pensions and who have no reasonable expectation of being re-employed in the appropriate unit from which they retired are not employees within the meaning of Section 2(3) of the Act.

5. Pensions and other benefits received by persons after they retire from the appropriate unit in the manner set forth above are not subjects of mandatory bargaining, but are subjects of permissive or voluntary collective bargaining.

6. The pensions and other benefits of persons actually retired and involved in this proceeding are vested rights and survive the expiration of any one or more contracts creating such benefits.

7. Respondent has not committed any unfair labor practices as alleged in the complaint.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, it is recommended that the Board dismiss the complaint herein in its entirety.

Dated at Washington, D. C.

James V. Constantine
Trial Examiner

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION and LOCAL UNION NO. 1, ALLIED CHEMICAL AND ALKALI WORKERS OF AMERICA

Case No. 8-CA-4202

Decision and Order

The complaint in this proceeding alleges that Respondent (the Employer) violated Section 8(a)(1) and (5) of the National Labor Relations Act by unilaterally modifying a negotiated hospitalization and surgical insurance plan for retired employees which was part of an outstanding collective-bargaining agreement between Respondent and the Charging Party (the Union).

On April 14, 1967, Trial Examiner James V. Constantine issued a Decision finding that Respondent's conduct did not transgress the Act and recommending that the complaint be dismissed. The General Counsel, the Respondent, and the Charging Party filed exceptions and supporting briefs.[1]

The Board has reviewed the Trial Examiner's rulings made at the hearing and finds that no prejudicial error was

[1] The Respondent's and the Charging Party's requests for oral argument are hereby denied because the record, including the exceptions and briefs, adequately presents all of the issues.

committed.[2] Those rulings are affirmed. The Board has also considered the Trial Examiner's Decision, the exceptions and briefs of the parties, the briefs of the *amici curiae*,[3] and the entire record. We hereby adopt the Trial Examiner's findings and conclusions only to the extent that they are consistent with this Decision.

I. The Union has represented employees in an appropriate unit at Respondent's Barberton, Ohio, plant since 1949. In 1950 the parties negotiated a contract which included provisions for a pension and a hospitalization and surgical insurance plan. They also reached an oral understanding that retired employees could elect to participate in the insurance plan by contributing the total cost of insurance premiums which would be deducted from their pension payments. Doubtless this was a meaningful benefit because it enabled retired employees to enjoy health insurance protection at the group rate. Except for a unilateral improvement made by Respondent in 1954, this oral understanding was effectuated without change for 9 years.

In 1959 the parties negotiated an improvement in the insurance plan for retired employees by increasing the maximum amount of daily hospitalization benefits. The parties also reduced to writing their understanding respecting the participation rights of retired employees.[4]

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[2] The Trial Examiner inadvertently stated in his Decision that the hearing was held in Mansfield, Ohio. In fact it was held in Akron, Ohio.

[3] *Amicus curiae* briefs were filed urging aproval of the Trial Examiner's Decision by the Chamber of Commerce of the United States and the National Association of Manufacturers. Briefs urging reversal of the Trial Examiner's Decision were filed by the American Federation of Labor and Congress of Industrial Organizations, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, the United Steelworkers of America, AFL-CIO, and the Amalgamated Transit Union, AFL-CIO.

[4] In these 1959 negotiations Respondent apparently challenged the right of the Union to bargain about such benefits for retired employees. Nonetheless, Respondent did bargain with the Union about this subject in 1959 and in subsequent contract negotiations.

During contract negotiations in 1962, the insurance plan was improved when Respondent agreed to contribute $2 per month towards the cost of insurance premiums for employees who retired after June 27, 1962, and who elected to participate in the plan. In these negotiations the parties also agreed to make age 65 the mandatory retirement age.

In their negotiations for a new labor contract in 1964, the parties again bargained about insurance benefits for retired employees. The Respondent agreed to increase its monthly contribution for each participating retired employee from $2 to $4 per month. However, anticipating Congress' enactment of Medicare legislation, the parties agreed that upon that occurrence the Respondent could reduce its contribution by the amount of the 1964 increase (i.e., $2 per month).

On November 23, 1965, following the enactment of Medicare and during the term of their outstanding collective-bargaining agreement, the Union asked the Respondent to engage in mid-term bargaining for the purpose of negotiating insurance benefits for retired employees of a type not available under Medicare. Respondent's industrial relations director, Rogers, took the request under advisement. Several months went by without any response. Then in March 1966, the Union reminded Respondent of the earlier request for mid-term bargaining.

At a meeting held on March 21, 1966, Respondent gave its answer. First, Respondent said that it intended, because of the intervening passage of Medicare, to reclaim its contribution of the extra $2 per month for retired employees under the terms of the 1964 contract beginning July 1, 1966, the effective date of Medicare. Second, Respondent said that it intended to cancel the negotiated health insurance plan for retired employees because, in Respondent's opinion, the enactment of Medicare made this insurance useless. (Respondent also contended that a nonduplication of benefits provision in the insurance plan precluded payment under the negotiated health insurance plan of those benefits which

were also provided by Medicare.[5]). Third, Respondent announced that it had decided to contribute $3 a month for each retired employee to be applied towards the cost of subscribing to supplemental Medicare coverage. Fourth, Respondent rejected the Union's request to bargain for a supplementary insurance plan and challenged the Union's right to bargain for retired employees at all.

The Union conceded Respondent's contract right to reduce its contribution, but challenged Respondent's right unilaterally to abrogate the provisions of the contract entitling retired employees to participate in the health insurance plan and requiring the Respondent to contribute a minimum of $2 per month for this purpose.

Two days later, on March 23, 1966, Respondent told the Union that, having reconsidered its position, Respondent would leave the health insurance plan for retired employees "intact." Instead, Respondent said that it intended to send letters to retired employees announcing that they could choose to withdraw individually from the negotiated health insurance plan and, in lieu thereof, that Respondent would contribute $3 per month towards supplemental Medicare premiums. The Union objected to this proposed action, asserting the right to bargain about any change in the contract concerning the health insurance plan. The Respondent again refused to bargain with the Union for a supplementary insurance plan.

The next day, March 24, Respondent sent the aforementioned letters to retired employees with the result that approximately 15 of 190 canceled their participation in the negotiated health insurance plan. In response to the Respondent's actions, the Union filed the instant charges.

In October 1966, Respondent proposed that the termination date of the existing labor agreement be extended

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[5] The Charging Party challenges the correctness of this interpretation of the insurance plan. But it is unnecessary to, and we do not, reach this question.

from October 20, 1967, to October 19, 1970. Included in that proposal was a clause reiterating Respondent's position taken in March 1966, which the Union rejected.

II. The Trial Examiner found the aforementioned facts, which are not in controversy. He then recommended dismissal of the complaint for the reason that, in his opinion, retired employees are not embraced by the policies of the statute nor by its definition of "employee," [6] and, therefore, that the Respondent was under no statutory duty to refrain from unilateral action with respect to retired employees. While acknowledging that pensions and health insurance benefits are statutory subjects of bargaining, he concluded, nonetheless, that the obligation which Congress has laid on employers and unions to bargain about these subjects abruptly ends on the date that employees retire from active employment.

In one significant respect, the Trial Examiner's findings are not clear to us. He found at the outset of his Decision that Respondent had "refused to meet and confer with the Union regarding changes unilaterally . . . made by Respondent," [7] yet he concluded his Decision with the finding that these unilateral changes did not modify the collective-bargaining contract "since employees [meaning retired employees] were free to decline" [8] the Employer's offer which constituted the unilateral change.

We disagree both with his interpretation of the statute and with his conclusion that Respondent's unilateral change in the insurance plan for retired employees was not a modi-

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[6] Section 2(3). "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . ."

[7] Trial Examiner's Decision 196-67, p. 5.

[8] Trial Examiner's Decision 196-67, p. 9.

fication of the subsisting collective-bargaining agreement. From our study of the Labor Act, its policies, its legislative and decisional history, we conclude: First, that retired employees are "employees" within the meaning of the statute for the purposes of bargaining about changes in their retirement benefits; second, that bargaining about changes in retirement benefits for retired employees is in any event within the contemplation of the statute because of the interest which active employees have in this subject; and, third, that bargaining about such benefits is fully consonant with the statutory requirement that "wages, hours, and other terms and conditions of employment" be subject to the institution of collective bargaining envisioned by the Act.

III. The statutory question raised here is an important one because of its obvious significance to ever-increasing numbers of retired workers and their dependents. It is no less important to current employees. That it arises for the first time more than 30 years after the initial passage of the Labor Act underscores emerging patterns in collective bargaining which have resulted in earlier retirement for employees on terms which include both retirement income and protections against the health hazards of advancing age.[9] At the same time the life expectancy for Americans is greater than ever before [10] which, in turn, increases their reliance on retirement benefits.

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[9] See Welfare and Pension Plans Disclosure Act, 1958, Section 2(a), 72 Stat. 997, 29 U.S.C. Section 301(a):

> The Congress finds that the growth in size, scope, and numbers of employee welfare and pension benefits plans in recent years has been rapid and substantial; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest: that they have become an important factor affecting the stabiliy of employment and the successful development of industrial relations; . . .

[10] Bureau of the Census, *Statistical Abstract of the United States* (1967). p. 53.

It has long been settled that the statute enjoins employers and unions to bargain in good faith about pensions and health insurance benefits to be enjoyed by employees upon their retirement. *W. W. Cross & Co.*, 77 NLRB 1162, 1163-1164, enfd. 174 F. 2d 875, 877-878 (C.A. 1); *Inland Steel Company*, 77 NLRB 1, enfd. 170 F.2d 247 (C.A. 7) cert. denied 336 U. S. 960. It is equally settled that unilateral changes in negotiated pension and insurance plans violate the statute. See *General Motors Corp.*, 81 NLRB 779, 780-781, enfd. 179 F.2d 221 (C.A. 2); *The Scam Instrument Corp.*, 163 NLRB No. 39, Trial Examiner's Decision at pages 7-8, enfd. 394 F.2d 884 (C.A. 7); *Charles E. Honaker*, 147 NLRB 1184, 1194. The single question to be decided here is whether these principles apply to such benefits for employees who have already retired.

Many unions and employers now bargain about pension and health benefits for retired employees, reflecting a "wide-spread understanding of the law shared in industrial circles and among members of the labor relations bar." [11] Indeed, the "trend of welfare plans toward the inclusion of retired persons is a fact of today's industrial life. . . ." *Bassie* v. *Kroger Co.*, 345 F.2d 58, 69 (C.A. 8). By enacting Medicare, Congress acknowledged and responded to the serious health needs of older Americans,[12] and, significantly, the Medicare amendments to Social Security were made available to al-

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[11] *United Drill & Tool Corp.*, 28 L.A. 677, 685 (Archibald Cox, arbitrator): [M]any companies, including the big steel and auto concerns, have promised to pay the more liberal pensions not only to those who are to retire in the future but also to those who have retired in the past . . . Common practice can hardly change the law but it does reflect . . . a wide-spread understanding of the law shared in industrial circles and among members of the labor relations bar.

See *Pacific Maritime Association*, 28 L.A. 600, 607-608. See also p. 17, *infra*.

[12] Health Insurance for the Aged Act, 79 Stat. 290, 42 U.S.C. Section 1395.

ready retired beneficiaries as well as to future beneficiaries.[13]

To the Trial Examiner the issue of this case turns simply on whether retired employees fall within the statutory definition of "employee." Finding that they do not, he concludes that no bargaining obligation is owed to them from the day that they retire, even with respect to changes in benefits which were negotiated on their behalf in the past when they were actively employed.

His Decision rests upon an anlysis of two distinct lines of cases which he loosely interweaves. First, he relies upon representation cases in which the Board has held that retired employees are not eligible to vote in Board-conducted elections to select a bargaining agent. *Public Service Corporation of New Jersey,* 72 NLRB 224, 229-230.[14] In these cases the Board decided only eligibility issues, intimating no opinion on the broader question involved here. Nevertheless, the Trial Examiner reasons that "if retired persons

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[13] See S. Rep. No. 404, Part I, 89th Cong., 1st Sess. 23-24 (1965):

> In past amendments to the Social Security Act, when new programs have been developed or when significant changes have been made to meet a national need, the Congress has followed the practice of extending the new or enhanced benefits not only to those who will become eligible for them in future years but also to the individuals then currently on the rolls. This has been done, of course, with the knowledge that the current beneficiaries on the rolls have not made contributions specifically for the increased benefits or the new benefits then being provided. Of course, this means that the benefits going to the already-retired group, represent in a sense an "unfunded" liability which has to be met out of future contributions. However, the practice has always been to cover the present beneficiaries. Basic to it is the recognition that the problem which such new legislation is designed to meet exists not only for those who will become eligible in the future but equally for present beneficiaries. *It may be noted that the same practices are often followed under private pension plans; namely, to extend benefit liberalizations to existing pensioners on the rolls when doing so for future pensioners.* [Emphasis supplied.]

[14] The Board there carefully noted that "even if pensioners were to be considered as employees, we believe that they lack a substantial community of interest with the employees who are presently in the active service of the Employers." 72 NLRB at 230.

are excluded from a unit for the purpose of voting for a representative of that unit, manifestly they should be eliminated from the unit for purposes of collective bargaining relating to employees in that unit." This conclusion fails to consider the nature of eligibility determinations which are not intended to be definitive rulings on employee status for all purposes. Eligibility "hinges on whether the employees have sufficient interest in the terms and conditions of employment to warrant their participation in the election of a collective-bargaining agent." *H. P. Wasson and Company,* 105 NLRB 373, 374. Even regular, active, full-time employees, who are hired after the election eligibility date, are normally not eligible to vote,[15] yet they are unquestionably "employees" about whom the employer and union have a duty to bargain in good faith. Conversely, persons who are not actively employed may be eligible to vote in some circumstances. Among these are persons on military leave, sick leave, or layoff. One, on the one hand, may be an active employee and not be eligible to vote, while, on the other hand, one may be an inactive employee and remain eligible to vote.

A more pertinent line of cases cited by the Trial Examiner involves unfair labor practice situations where the statute has been applied to persons who have not been initially hired by an employer or whose employment has terminated. Illustrative are cases in which the Board has held that applicants for employment[16] and registrants at hiring halls[17]—who have never been hired in the first place—as well as persons who have quit[18] or whose employers have gone out of business[19] are "employees" embraced by the policies of the Act. The Trial Examiner distinguishes these cases on the ground that in each of them "the person

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[15] *Wayne Knitting Mills, Inc.*, 1 NLRB 53, 55.

[16] *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 117, 182-187.

[17] *Local 872, International Longshoremen's Association*, 163 NLRB No. 69.

[18] *Goodman Lumber Co.*, 166 NLRB No. 48.

[19] *Chemrock Corporation*, 151 NLRB 1074, 1076-79.

involved—unlike the pensioners here—was a member of the working class" or on the ground that in each of those cases there are "the reasonable prospect that an employer-employee status was capable of being developed." These are legally tenuous distinctions drawn from cases dealing with distinctly different issues. We believe, on the contrary, that these cases support the conclusion that retired persons are "employees" under the policies of the Act. They plainly show that the Act's protection is not narrowly limited to those who are recorded on the employer's current payroll. Indeed, employees, who have been actively employed for a sufficient number of years to have earned a pension, have deep legal, economic, and emotional attachments to a bargaining unit which measurably exceeds the attachments of others who have been held to be employees. If one can be an "employee" *before* he has been hired, or *after* his employer has gone out of business, or even while he is on active military duty thousands of miles away, we cannot agree that one who has spent his productive years in the bargaining unit is beyond the protective ambit of "employee" rights.

When an employee retires from the bargaining unit, most of the threads which once bound him to the unit are severed, except those which affect his retirement rights. But his retirement status is a substantial connection to the bargaining unit, for it is the culmination and the product of years of employment. To accept the Trial Eaminer's view that a retired employee is a legal stranger to the bargaining unit would require us to overlook obvious realities of human behavior as well as clear national policies which reject the view that workers are human machines [20] who, when their economic utility diminishes, may be cast aside and forgotten. [21]

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[20] Clayton Act, Section 6, 38 Stat. 731, 15 U.S.C. Section 17: "The labor of a human being is not a commodity or an article of commerce."

[21] See, e.g., Age Discrimination in Employment Act, 1967, Section 2, 81 Stat. 602, 29 U.S.C. Section 621; Welfare and Pension Plans Disclosure Act, 1958, Section 2, 72 Stat. 997, 29 U.S.C. Section 301; Executive Order 11141, 29 Fed. Reg. 2477 (1964).

Compensation for employment need not be synchronous with the performance of labor. Current services may be rewarded by benefits which arise (or continue) in the future, [22] and past services may be retroactively compensated with additional benefits. [23] Thus, it is not "active" employee status at the time of enjoyment of a negotiated benefit that controls whether it falls within "wages . . . [or] other terms and conditions of employment." The critical question is whether the benefit is founded on employment—past or present. [24] The health insurance plan here was negotiated for active employees to be enjoyed upon retirement, and its terms relate back to their active employment. For retired employees, the benefits paid to them in retirement are part of the return on their investment of a lifetime of labor. In some respects, an employee's retirement from active employment and his separation from the daily association with fellow workers is the very time when he is most vulnerable economically and most needs representation. This is the point at which his economic alternatives are most limited because of his age. It would virtually stand the Act on its head to hold that his employer is free to deal with him unilaterally and that the union may not represent him with respect to changes in the very plan which it negotiated for him.

The Board and courts have long held that a rigid definition of "employee" was not intended by Congress. *Phelps Dodge Corp.* v. *N.L.R.B.* 313 U.S. 177. In *Briggs Manucfacturing Company,* 75 NLRB 569, 571, the Board held that:

> This broad definition covers, in addition to employees of a particular employer, also employees of another

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[22] For example, pensions, *Inland Steel Co., supra,* and health, accident and life insurance, *W. W. Cross, supra.*

[23] See, e.g., *Bergen Point Iron Works,* 79 NLRB 1073, 1074 (retroactive application of contract terms).

[24] As the court stated in the *W. W. Cross* case, the term "wages" comprehends ". . . emoluments resulting from employment" and ". . . embraces within its meaning direct and immediate economic benefits flowing from the employment relationship." 174 F.2d 875, 878 (C.A. 1).

employer, or former employees of a particular employer, or even applicants for employment.

And the Supreme Court said in *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111, 129, 130:

> . . . the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute," leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by *underlying economic facts* rather than technically and exclusively by previously established legal classifications. . . .
>
> *That term, like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship. "Where all the conditions of the relation require protection protection ought to be given."* [*Emphasis supplied.*]

The Court added:

> It is not necessary in this case to make a completely definitive limitation around the term "employee." That task has been assigned primarily to the agency created by Congress to administer the Act. Determination of "where all of the conditions of the relation require protection" involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act.

The lesson of the precedents, therefore, is that employee status is not a question to be resolved by the mechanical ap-

plication of an *a priori* definition; it requires an appraisal of the "underlying economic facts" with "reference to the purpose of the Act." *Id.* For the reasons stated above, the "underlying economic facts" of this case persuade us that Congress intended to confer employee status on retired employees with respect to health insurance plans affecting them.

Our conclusion that retired employees' retirement benefits are embraced by the bargaining obligation of Section 8(a) (5) is also supported by other provisions of the statute. Section 302 (b) (5) (B) requires employer contributions to joint labor-management pension and health plans to be held in trust and to be administered by an equal number of employer and employee trustees. Congress' command that unions participate in the administration of such plans for retired employees through union appointed trustees requires unions to act as the "representatives" of retired employees. See *U.S.* v. *Ryan,* 350 U.S. 299. Moreover, in decisions interpreting the term "employees" in Section 302(b), appellate courts have held that it includes both "current employees and persons who were current employees but are now retired." *Blassie* v. *Kroger* Co., 345 F. 2d 58, 70 (C.A. 8); *Teamsters, Local 688* v. *Townsend,* 345 F. 2d 77 (C.A. 8); *Garvison* v. *Jensen,* 355 F. 2d 487 (C.A. 9). The Trial Examiner's Decision would create the anomaly that retired employees are not "employees" whose ongoing benefits are fit subjects of bargaining under Section 8(a) (5), while under Section 302(b) they are "employees" for the purpose of administering the same health insurance benefits. It would create the further anomaly that a union would not be entitled to act as the representative of retired employees under Section 8(a) (5), while subject to an explicit statutory duty to act as their representative under Section 302(b). [25]

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[25] The Internal Revenue Service has also concluded, in regulations interpreting the Revenue Code of 1954, that a benefit plan "is for the exclusive benefit of employees or their beneficiaries even though it may cover former as well as present employees . . ." Internal Revenue Service Regulations, Section 1.401-1(b)(4), 21 Fed. Reg. 7277 (1956).

We conclude, therefore, that retired employees are "employees" and that changes in benefits which are rooted in their years of active employment are encompassed within the bargaining obligation of the Act.

IV. Independent of our finding that retired workers are "employees," we also conclude that the subject of retirement benefits for retired employees is embraced by the bargaining obligation of the statute because it vitally affects active bargaining unit employees. At the very least, the Union and current employees have a legitimate interest in assuring that negotiated retirement benefits are in fact paid and administered in accordance with the terms and intent of their contracts, and Respondent's unilateral modification of its outstanding collective-bargaining agreement might itself be dispositive of this case. See p. 21, *infra*. But the interest of current employees is broader than assuring faithful contract compliance. [26]

Providing adequate economic security during retirement is a continuing concern of employers and employees. [27] For employers, the promise of retirement benefits aids in obtaining good workers, retaining them, and easing their acceptance of retirement. [28] For active employees, provisions for pension and health benefits after retirement are an integral part of their total compensation. *Inland Steel Company*, 77 NLRB 1, 4-5; *W. W. Cross & Co.*, 77 NLRB 1162, 1165, fn. 5. To them retirement benefits may be viewed as a wage in-

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[26] See *Upholsterers* v. *American Pad Co.*, 372 F.2d 427 (C.A. 6).

[27] See generally Senate Report No. 1734, Welfare and Pension Plan Investigation, pages 11-13, 84th Congress, 2nd Session (1956); President's Committee on Corporate Pension Funds, *Public Policy and Private Pension Programs*, pages 1-2 (GPO, 1965); Harbrecht, *Pension Funds and Economic Power*, pages 6-10 (The Twentieth Century Fund, 1959); Kittner, *Health Insurance and Pension Plan Coverage in Union Contracts*, 85 Monthly Lab. Rev. 274-277 (March 1962);

[28] See Strong, *Employee Benefit Plans in Operation*, pages 1-9 (BNA, 1951); Hickey, *The Establishment and Administration of Pension Plans in the Labor Relations Process*, 18 Vanderbilt L.R. 151, 157-158; Harbrecht, *Pension Funds and Economic Power*, pages 74-91.

crease foregone, "deferred wages" or "human depreciation." [29] Active employees, in contemplation of whether their own health needs will be adequately met upon their future retirement, have a selfish as well as a compassionate interest in bargaining about the adequacy and the administration of benefits for retired employees.

The parties to this case agreed in 1962 to mandatory retirement at age 65. An active employee's morale and his willingness to accept such retirement may be significantly influenced by the adequacy of negotiated postretirement health insurance to meet rising costs in the future. Thus, in bargaining about mandatory retirement and pension eligibility dates, the flexibility or inflexibility of retirement benefits is a factor which must enter the mix of considerations which will lead to agreement upon an overall retirement program.

It is not uncommon to group active and retired employees under a single health insurance contract with the result that ". . . active and retired rates [are] all combined in one rate or the retiree rate [is] subsidized by the actives." Foust, *Effect of Medicare on Privately Bargained Plans,* 19 N.Y.U. Conf. on Labor 273, 282 (1966). In such a combined plan for active and retired employees, like the plan in this case, it is the size and experience of the entire group which may determine insurance rates. In this respect the active employees could also benefit from the membership of retired employees in the group whose participation enlarges its size and might thereby lower costs per participant. Moreover, it is evident that changes in retirement benefits for retired employees affect the availability of employer funds for active employees. Therefore, the impact of decisions on such matters on active employees is direct and immediate.

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[29] See Harbrecht, *Pension Funds and Economic Power,* pages 91-99. However, we need not appraise the various differing conceptual approaches to retirement benefits other than to note they all implicitly recognize the employment connection of these benefits. See, Harbrecht, *op. cit.;* Ridgley, *The Report of the President's Cabinet Committee on Private Pension Plan Regulation: An Appraisal,* 63 Mich. L.R. 1258, 1264.

For these reasons, we also conclude that bargaining about changes in benefits for retired employees is an appropriate subject for bargaining because of its inextricable relationship to and impact on the wages, hours, and working conditions of those actively employed in the bargaining unit.

V. Our dissenting colleagues and the Respondent broadly challenge whether collective bargaining is a suitable means for resolving health and welfare questions affecting retired employees. Reduced to essentials, their position is that, once consummated, a collectively bargained plan of retirement benefits is frozen and immutable with respect to employees who have retired, unless an employer chooses to make changes unilaterally or voluntarily agrees to bargain over changes. This position is the antithesis of the statute's design that the collective-bargaining process should be a continuing one in which the parties share responsibility for the formulation, the execution, and the results of their agreement. Because the parties could agree in advance upon formulas which would provide for "flexible treatment" [30] of their retirement programs in anticipation of future contigencies, [31] it would be anomalous to hold that the statute does not encourage resort to collective bargaining in response to specific needs as they arise in the life of a retirement program.

Forced reliance on fixed, preretirement formulas has shortcomings which may lead to disappointing results in the operation of a plan. There may be a variety of changes in the experience of the covered group or in the operation or administration of the plan itself which the parties cannot foresee. The changing value of the dollar, rising medical costs, and other economic developments might alter the real level of benefits envisaged by the original formula. The parties may also reappraise their feelings as to the fair

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[30] *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 409.

[31] In anticipation of a long-term inflationary cycle, the parties might, for example, provide for an annual benefit increment of a certain percentage of the basic benefit or an increment tied to the cost-of-living index.

economic share owing to retired workers, just as society itself periodically reexamines its commitments to the elderly. In addition, insurance and health care plans are constantly developing new features and refinements.

There is also the impact of expanding government social welfare programs on private health plans. Recently, private health plans had to be meshed with Medicare in order to avoid duplication and to tailor supplemental, private coverage to needs of the particular employer and his employees. See Foust, *Effect of Medicare on Privately Bargained Plans,* 19 N.Y.U. Conf. on Labor 273-285; *Medicare and Negotiated Health Insurance for Workers,* 88 Monthly Lab. Rev. No. 9, pp. iii-iv (Sept. 1965); *Development in Industrial Relations,* 89 Monthly Lab. Rev. No. 4, p. 420 (April 1966). This was of course the very problem which gave rise to the instant case.

With respect to new problems which arise under a health insurance plan for retired employees, collective bargaining is not only a suitable method for exploring different solutions, but it is probably the most rational and effective method. A plan which has its inception in the collaborative process of a labor-management agreement reflects the assumptions, arguments, and aspirations—as well as the compromises—of the parties to that process. While the process of collective bargaining does not guarantee that its agreements will be wise, the process does help to assure the acceptability of those agreements because they were reached through the participation and the commitment of the parties most affected. Moreover, to deny collective bargaining a role in the development of health benefits plans for retired employees might undermine their viability. These private plans provide an important supplement to governmental social welfare programs,[22] and an effective method of dispute settlement will contribute to their purposefulness.

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[22] See President's Committee on Corporate Pension Funds, Public Policy and Private Pension Programs, pages 22-25 (GPO 1965).

Collective bargaining is a dynamic institution. It flexibly adapts to new challenges to industrial peace. As the Court of Appeals for the First Circuit has held, ". . . Congress did not intend to restrict the duty to bargain collectively only to those subjects which up to 1935 had been commonly bargained about in negotiations between employers and employees . . ."; rather it meant to compel bargaining ". . . with respect to any [employment] matter which might in the future emerge as a bone of contention between them . . . *W. W. Cross & Co.* v. *N.L.R.B.*, 174 F.2d 875, 878 (C.A. 1).[33] Thus an examination of current practices and trends in negotiations is relevant in determining what is a mandatory subject of bargaining. "Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective-bargaining process." *Fibreboard Paper Products Corp* 1. N.L.R.B., 379 U.S. 203, 211.

Bargaining on benefits for workers already retired is an established aspect of current labor-management relations. The United Auto Workers, the United Steelworkers, and the Amalgamated Transit Union, *amici curiae,* have cited many instances in which bargained increases in benefits have been obtained for retired workers. Several examples of collective bargaining on the integration of Medicare into private health plans can be found in 89 Monthly Labor Rev. No. 4, page 420 (April 1966). See also Foust, *Effect of Medicare on Privately Bargained Plans*, 19 N.Y.U. Conf. on Labor 273-285 (1966). This is pragmatic recognition that adjustments in retirement benefits for those already retired are suitable subjects for the collective-bargaining process. In our view holding these matters to be mandatory subjects of collective bargaining will "promote the fundamental purposes of the Act by bringing a problem of vital concern to labor and management within the framework established

[33] See also *Houston Chapter Associated General Contractors*, 143 NLRB 409, 413, enfd. 349 F.2d 449 (C.A. 5), cert. denied 382 U.S. 1026.

by Congress as most conducive to industrial peace." *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203, 211. [34]

Our dissenting colleague also argues that bargaining about benefits for retired employees will upset the "firm package of benefits [negotiated] for a fixed period." Our decision, however, does not introduce any element of uncertainty into the bargaining process that does not already exist. All employee benefits are subject to change at periodic intervals, either at the expiration of, or at times, fixed by, the contract itself. At such times the "firm package of benefits" previously agreed upon becomes flexible, and the alterations which result from such bargaining might require revision of the parties' expectations and future planning. The dissent overlooks the fact that the parties before us have bargained about retirement benefits for retired employees for nearly 20 years. Moreover, in this case, the Employer unilaterally changed the "firm package of benefits," to which our dissenting colleague does not object. The logic of the dissent thus suggests the tenuous proposition that the package of benefits is "firm" only as a limitation on the Union's right to bargain about benefits for retired employees, but not "firm" as a limitation on the Employer's right to make unilateral changes. The fact that many employers and unions, like the parties before us, have long bargained about changes in health and other benefit plans for retired employees negates the dissent's concern that this is not a suitable subject for bargaining.

The dissent also fails to take account of the practical manner in which many retirement benefits plans are created and administered. Typically, a retirement benefit plan is created

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[34] This conclusion does not, of course, preclude Respondent from bargaining hard, without concession, for broad areas of control over retirement benefits. See *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 408-409. However, Respondent here has gone beyond hard bargaining; it has taken the position that the Union has no statutory right to bargain for retired employees and that it may unilaterally make decisions affecting the rights of retired employees.

by a collective-bargaining agreement which is written only in general terms to provide for the creation of a plan and a method of financing. The details of eligibility, benefits,, and administration are normally incorporated in a subsequently drafted trust agreement, not in the collective-bargaining agreement itself. In fact, even trust agreements are often written in general terms to permit the trustees to adopt specific regulations concerning eligibility and other matters, subject to periodic changes which the trustees may make as circumstances dictate. See *Kosty* v. *Lewis,* 319 F. 2d 744 (C.A.D.C.),[35] cert., denied 375 U.S. 964. See also *In re Feldman,* 165 F. Supp. 190 (S.D.N.Y.). Thus, plans of this type are not static arrangements which, once executed, never change. They may, depending on their terms, undergo continuing change.

The dissent further asks "if the union may require bargaining over increases, could the employer not insist on decreases?" This a complex and many-sided question which does not admit of a single, definitive answer here, nor is it relevant to the precise issue before us. The answer will doubtless depend in part upon the circumstances of each case.

There is a variety of formulas for creating, financing, and administering pension and health plans, and the legal implications of each may differ. For example, health plans are of two main types: (1) those in which the collective-bargaining agreement specifies only the level of the employer's contribution, without specifying the benefits which will be provided from the contribution; and (2) those in which the collective-bargaining agreement specifies only the level of benefits which the employees will receive, without specifying the cost obligation which the employer will incur in pro-

[35] *Id.* at 748-749.

> We do not deny the authority of Trustees to revise pension eligibility requirements in the light of their experience. Flexibility of this kind seems especially necessary for the operation of this Fund, tied as it is to the fluctuating fortunes of the coal industry.

viding those benefits. How the parties choose to create, amend, or restructure such plans—consistent with their legal responsibilities to employee beneficiaries—is plainly a matter which Congress has entrusted to their judgment to be exercised in the light of their experience and the needs of affected employees. Normally, of course, retirement rights which are "vested" cannot be divested, but is does not inexorably follow that as a corollary "vested" rights may not be improved. What kinds of rights are "vested" in retired employees, when and how they vest, and, indeed, what "vesting" means in the context of a particular case are all problems of considerable importance which have not been entirely resolved in the courts and which are not presented by this case. See *Kosty* v. *Lewis, supra.* See also Harbrecht, *Pension Funds and Economic Power,* 53-61, 163-190; Strong, *Employee Benefit Plans in Operation,* 220-225. Thus, there is no necessity in this proceeding to decide whether and, if so, under what hypothetical circumstances an employer might be free to bargain about a decrease in retirement benefits being received by retired employees. We hold only that the duty to bargain about health care benefits does not end abruptly on the day that an employee retires and that his employer is not free on that day to deal with him unilaterally.

Finally, it is asserted that bargaining about retirement benefits for retired employees will raise difficult questions in the event of changes in employee representatives or changes in employers. But that problem is not new in any respect. Parties always bargain in the present in contemplation of continuity in their relations. A change in the employer's or the union's status may indeed require reexamination of their needs and resources at that time.

VII. The Trial Examiner concluded that Respondent's March 1966 actions did not constitute a modification of health benefits for the reason that Respondent gave retirees the choice between supplemental Medicare and the existing health plan. However, the possible methods of adjusting the

existing plan to Medicare's coverage may be considerably more varied than this unilaterally formulated choice offered by Respondent. See Foust, *Effect of Medicare on Privately Bargained Plans,* 19 N.Y.U. Conf. on Labor 273-285; *Medicare and Negotiated Health Insurance for Workers,* 88 Monthly Labor Rev. No. 9, pages iii-iv (Sept. 1965). Had the Union studied the matter and expressed its views in negotiations, a different option may have resulted. Whether Respondent's offer resulted in a desirable increase in retirement benefits is immaterial to our conclusion that Respondent was not free to act unilaterally; Respondent's establishment of a fixed, additional option in and of itself changed the negotiated plan of benefits. *C. & S. Industries, Inc.,* 158 NLRB 454, 457-458. Accordingly, we find that by unilaterally modifying its medical insurance plan for retired employees, Respondent violated Section 8(a) (5) and (1) of the Act.[36]

The General Counsel does not contend, nor do we find, that Respondent was obligated to engage in mid-term bargaining with the Union over its proposal to negotiate amendments in the health insurance plan. While the parties are of course free to engage in mid-term bargaining voluntarily, we hold only, on the record of this case, that the Respondent violated the statute by making unilateral changes in the terms of an outstanding contract with respect to benefits for retired employees.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom, and from like or related conduct, and that

[36] Section 8(d) of the Act, which defines the bargaining obligation of Section 8(a)(5), expressly provides that, with exceptions not relevant here, "no party to such contract shall terminate or modify such contract." That the Respondent's unilateral modification of this contract might also give rise to an arbitration proceeding or an action for contract enforcement does not preclude the Board's exercise of its statutory obligation to remedy the unfair labor practice. *N.L.R.B.* v. *C & C Plywood Corp.,* 385 U.S. 421; *N.L.R.B.* v. *Acme Industrial Co.,* 385 U.S. 432.

it take certain affirmative action to effectuate the policies of the Act.

Conclusions of Law

1. Pittsburgh Plate Glass Company, Chemical Division, is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union No. 1, Allied Chemical and Alkali Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By instituting unilateral adjustments in the health insurance plan for its retired employees, Respondent violated Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Pittsburgh Plate Glass Company, Chemical Division, Barberton, Ohio, its officers, agents, successors, and assigns, shall take the following action:

1. Cease and desist from:

(a) Refusing to bargain collectively with the above-named labor organization with respect to retirement benefits.

(b) Making unilateral adjustments in health insurance plans for retired employees, without first negotiating in good faith with the above-named Union concerning such adjustments.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board deems necessary and appropriate to effectuate the policies of the Act:

(a) Upon request of the above-named Union, rescind any adjustment in the health insurance plan for retired employees which Respondent unilaterally instituted.

(b) Mail a copy of the attached notice marked "Appendix" [37] to each retired employee and post copies in its plant in Barberton, Ohio. Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by the Respondent's authorized representative, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 8, in writing, within 10 days from the date of this Decision, what steps have been taken to comply herewith.

Dated, Washington, D.C.

Frank W. McCulloch,	Chairman
John H. Fanning,	Member
Gerald A. Brown,	Member
Howard Jenkins, Jr.,	Member

NATIONAL LABOR RELATIONS BOARD

(Seal)

Member Zagoria, dissenting:

I am constrained to dissent from the decision of my colleagues and I would affirm the result reached by the Trial Examiner.

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[37] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order."

Stripped to its essentials, this is a case where a union charges an employer unilaterally offered an additional option on its health plan for past pensioners. The Company said it did so because the Federal Medicare program made its own program obsolete, but, after union protests, assured the pensioners they could choose to retain the original program without change. On this narrow base, the Board majority has erected a decision with far-reaching implications in the area of mandatory duty to bargain.

I do not question in the slightest the well-established principle that retirement and profit-sharing plans and other forms of deferred compensation are mandatory subjects for collective bargaining when the proposed beneficiaries are employees currently on the payroll, and it is the wages and benefits to be paid for their labor which is the subject of the negotiations.

The question in the present case, however, is whether *retirees* are employees in this unit and whether there is a duty to bargain for these former workers placed upon the shoulders of the Company and a duty placed on the Union to represent them fairly in such negotiations. Under the Act a union's status as exclusive bargaining agent is with respect to all employees in the appropriate unit. The fact that retirees are no longer working for the employer, are not on the payroll, probably have no access to the plant, or hope of recall to employment does suggest that their status is accurately described as pensioners, not as employees. Apart from the question whether retirees are "employees" as defined by the Act, it is clear to me that retirees are not within the bargaining unit. The Board itself recognizes this for it does not, for example, permit retirees to vote in a certification election; nor would the Board, I am confident, permit a group of retirees to initiate a decertification election. Indeed, in this case, and the *amicus* briefs indicate this may not be atypical, retirees are limited only to honorary non-voting membership status by the union. This being so, the Act gives the union no authority or duty to represent them

and imposes no obligation on the employer to bargain about them with the union.

I am not persuaded by the majority's analogies to other areas of Board law, and their contention that the terms "employee" and "unit" are flexible enough to encompass the present situation. One area mentioned concerns the Board's election eligibility rules, under which, it is pointed out, some individuals are not permitted to vote, even though by the time of the election they are employees in the unit. However, this rule merely provides an administrative cutoff date for convenience in conducting elections, and to prevent payroll padding and other possible abuses. It does not in my view have relevance in an area where such considerations are not present.

The majority's reference to the *Wasson* line of cases is likewise not pertinent. The Board did, at one time, as in *Wasson*, make a distinction between unit inclusion and eligibility to vote. It no longer does so [38] for reasons precisely in point here: if an employee has sufficient interests to be included in the unit, he should be given a voice in the selection of a bargaining representative; if he is not given such voice, he should not be included in the unit.

Lastly, the cases involving discrimination are readily distinguishable. Though an employer may violate Section 8(a)(3) by refusing to hire particular employees, he does not normally violate Section 8(a)(5) by refusing to bargain about them, where they have not yet been made his employees.[39] As the Board has stated in a related context:

> We do not regard as controlling for purposes of determining for whom an employer must bargain those cases cited . . . which hold that the antidiscrimination provisions of Section 8(a)(3), (4) and (b)(2) of the Act forbid discrimination against applicants for employment. The antidiscrimination provisions refer to "employee" *generally*, whereas, unlike those provisions,

[38] *Denver-Colorado Springs-Pueblo Motor Way*, 129 NLRB 1184.

[39] *Piasecki Aircraft Corp.*, 123 NLRB 348, 349-350, enfd. 280 F.2d 575 (C.A. 3), cert. denied 364 U.S. 933.

> Section 8(a)(5) contains specific language requiring an employer to bargain for *"his* employees."[40]

The employees involved in the present case may have had no employment with the employer for 5, 10, or even 15 years. Unlike employees on sick leave or military leave, they have no prospect or intention of returning. In most respects retirees are in no different status than individuals who have left the bargaining unit for other reasons. In holding them to be within the unit for which the Union has a right to bargain, the Board is going beyond anything it has said or done in other types of cases.

Further, the majority position poses some difficult questions. For example, where the union currently representing employees in a bargaining unit is not the same one chosen by the retirees when they were actively employed, which union is the appropriate representative of the retirees? In some situations, the retirees may have earned their pension during a period in which the majority of employees rejected collective-bargaining representation. Is the present bargaining agent obligated to represent these retirees? If it does represent them, what is the extent of its duty of fair representation? Do the retirees have access to the Board or courts, if they feel they have been unfairly represented? May the bargaining agent require pensioners to comply with union-security requirements adopted by the active membership?

Now as to the bargaining itself, the statute requires bargaining "in good faith with respect to wages, hours, and other terms and conditions of employment," but retirees are no longer engaged in employment and the bargaining under discussion here relates to terms and conditions of employment long since completed. An oft-cited advantage of collective bargaining is that it results in a specific agreement satisfactory to both sides setting out a firm package of benefits for a fixed period. The company can base its prices and general business policy on this and workers can insist on exact payment of the agreed-upon benefits. If

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[40] *Page Aircraft Maintenance, Inc.*, 123 NLRB 159, 163, fn. 5.

mandatory bargaining is required, either party years later can reopen the agreement and unravel the provisions. Moreover, bargaining is a two-way street, and not only upward. Thus, if the union may require bargaining over increases, could the employer not insist on decreases?

As the majority view suggests collective bargaining is a dynamic institution. Indeed the examples cited of successful bargaining for increases in benefits for retired workers demonstrates that foresighted employers and unions, recognizing the mutuality of interest in retired workers, have used the institution of voluntary collective bargaining imaginatively. They have made adjustments although the affected group could no longer pose the threat of withholding its labor to implement its demands. They have found the subject suitable, even if not mandatory.

We are all understandably concerned that benefits promised to retirees be paid. In addition to individual court actions by aggrieved pensioners, many unions have voluntarily, and at considerable cost to themselves, undertaken to represent retirees in claims against employers and, similarly, many employers have voluntarily, also at considerable cost to themselves, undertaken to improve benefits to retirees, recognizing the impact of inflation on those receiving fixed benefits. Many unions and companies, recognizing their mutual interest in retiree benefits, have voluntarily worked out arrangements to improve past pensioners' rights and benefits. These voluntary agreements, these voluntarly representations, are a tribute to the humanistic quality of an enlightened labor-management relationship, but to hold that these matters are the subject of mandatory bargaining, while perhaps socially desirable, is, in my judgment, beyond the intent of the statute. I would therefore, like the Trial Examiner, dismiss the complaint.

Dated, Washington, D. C.

Sam Zagoria, Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECISION AND ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the polices of the
NATIONAL LABOR RELATIONS ACT
(As Amended)

we hereby notify our employees that:

WE WILL NOT refuse to bargain with LOCAL UNION NO. 1, ALLIED CHEMICAL AND ALKALI WORKERS OF AMERICA, with respect to retirement benefits.

WE WILL NOT unilaterally institute adjustments in health insurance plans for retired employees, without first negotiating in good faith with the above-named Union concerning such adjustments.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request of the above-named Union, rescind any adjustments made in the health insurance plan for retired employees which we unilaterally instituted.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION
(Employer)

Dated By

(Representative)
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1695 Federal Office Building, 1240 E. 9th Street, Cleveland, Ohio 44199, Telephone 216-522-5715.

General Counsel Exhibit No. 2

MEMORANDUM AGREEMENT

The Pension Agreement between the Company and the Union which was executed January 6, 1960 shall be amended, effective June 28, 1962 as necessary to provide for such modification and changes as summarized below:

1) The name of the Company shall be changed from Columbia Southern Chemical Corporation to Pittsburgh Plate Glass Company, Chemical Division.

2) The amount of Normal Retirement Pension for employees who retire on or after June 28, 1962 shall be increased from $2.25 to $2.50 for past service credited prior to June 28, 1962 and from $2.50 to $2.80 for future service credited after June 27, 1962.

3) The Total and Permanent Disability Pension eligibility and payment sections shall be modified to provide that subsequent to June 27, 1962:

a The continuous service requirement shall be fifteen (15) years at age 60 or 20 years continuous service regardless of age, with payments of $5.00 per month per year of service prior to June 28, 1962 and $5.60 per month per year of service after June 27, 1962.

b Any employee who not later than June 27, 1964 becomes disabled within the meaning of the disability provisions of the Pension Agreement due to expire June 28, 1964 and such employee does not qualify under the terms of the applicable provisions of the new Pension Agreement due to expire June 28, 1967 such employee shall be entitled to the benefits he was entitled to receive under the prior Pension Agreement.

4) With respect to Part I, Section 1, Paragraph D and Part I, Section 2, Paragraph A (6) of the current pension plan covering the retirement of employees by "mutual agreement," all provisions, requirements, and amounts payable, will remain in effect.

In addition, the new Pension Agreement will be modified to provide that the Company may, at its sole option, retire an employee with fifteen (15) years continuous service at age 62. Employees so retired will receive the new Disability Pension payment amounts and such retired employees pension payments will not be re-computed prior to age 65 to offset reduced Social Security benefits.

5) The new pension plan shall provide for compulsory retirement of eligible employees at age 65 after June 27, 1964. During the period June 28, 1962 to June 27, 1964 those terms of the current pension plan with respect to the Company's right to retire an eligible employee at age 65 and an eligible employee's right to retire at age 65 shall remain in effect.

6) The new Pension Agreement shall remain in effect for five (5) years from June 28, 1962, at which time it will be automatically extended to the expiration date of the then current Labor Agreement.

7) It is understood and agreed that the above outlined provisions as agreed to shall be incorporated in the Pension Agreement and with specific language amending the Pension Agreement so as to accomplish all amendments necessary.

The Pension Agreement as amended, is subject to approval of the Board of Directors of the Company and of the Commissioner of Internal Revenue before it becomes effective.

All other provisions of the Pension Agreement shall remain in effect except as amended in accordance with the above.

Signed this 29th day of July, 1962.

PITTSBURGH PLATE GLASS COMPANY
CHEMICAL DIVISION

ALLIED CHEMICAL AND ALKALI
WORKERS OF AMERICA

MEMORANDUM AGREEMENT

The Company agrees to provide a reduced Hospitalization and Surgical plan for employees retiring after June 27, 1962, for which employees will pay the full amount of premium. For employees who elect to continue this reduced coverage, the Company will make a contribution of $2.00 per month (to each such employee) which amount shall be applicable only toward the cost of the Hospitalization and Surgical plan. The initial cost of this Hospitalization plan will be $11.41 per month for the Pensioner and his spouse.

In addition, all employees who retire after June 27, 1962, will receive $2,000 Life Insurance coverage at no cost to the employee.

Signed this 29th day of July 1962.

PITTSBURGH PLATE GLASS COMPANY
CHEMICAL DIVISION

ALLIED CHEMICAL AND ALKALI
WORKERS OF AMERICA

General Counsel Exhibit No. 3

(excerpts)

AGREEMENT

PITTSBURGH PLATE GLASS COMPANY
CHEMICAL DIVISION
AND
LOCAL UNION NO. 1
ALLIED CHEMICAL AND ALKALI
WORKERS OF AMERICA

JULY 29, 1962

BARBERTON, OHIO

ARTICLE I.—PURPOSE

Section 1. It is the intent and purpose of the parties hereto, that this agreement shall promote and improve industrial and economic relations, will establish a basis for securing cooperation and goodwill between the Company, the Union and the employees, and to set forth herein, the basic agreement covering rates of pay, hours of work and conditions of employment to be observed between the parties, and shall cover the employment of persons employed by the Pittsburgh Plate Glass Company, Chemical Division Plant at Barberton, Ohio, covered by this Agreement.

Section 2. In consideration of the obligations assumed by the Company in this Agreement, the Union is in accord with the objective of achieving in this plant maximum productivity per employee during the term of this Agreement in order that the Company may receive a fair day's work for a fair day's pay as provided for in this Agreement.

Section 3. It is mutually understood that the terms and conditions relating to the employment of workers covered by this Agreement have been decided upon by collective bargaining.

Section 4. During the life of this Agreement the Company will not enter into any contract with any employee or group of employees, or with any other employees' organization in the Pittsburgh Plate Glass Company, Chemical Division Plant at Barberton, Ohio, which would supersede the provisions of this Agreement.

Section 5. The Company and the Union shall comply with the hours of labor and rates of pay and other conditions of employment prescribed by this Agreement.

Section 6. The Company shall not reclassify employees or duties or occupations performed nor engage in any activity for the purpose of defeating or evading the provisions of this Agreement.

ARTICLE II.—RECOGNITION

Section 1. The Company recognizes the Union as the exclusive representative of all the employees in the Pittsburgh Plate Glass Company, Chemical Division Plant at Barberton, Ohio, working on hourly rates of pay, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other working conditions of employment.

Section 2. It is understood that all hourly employees in the position of group leaders or temporary hourly foremen as distinguished from supervisors are to come under the provisions of the contract, however, hourly group leaders or temporary hourly foremen shall not be permitted to administer the grievance procedure of the Labor Agreement.

Section 3. The term "regular employee" as used in this Agreement shall not include any salaried employee or any

employee who has not passed his plant probation period of forty (40) actual working days, except as otherwise provided herein.

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Article XXXI.

Insurance Benefits

Section 1. Effective September 1, 1962, the Company agrees to provide a policy or policies of group hospitalization and surgical benefits insurance including medical and major-medical coverage for employees and their family dependents who are eligible for and elect such coverage and, a program of Group Life Insurance for eligible male employees. An employee insured under this Section 1 shall contribute toward the monthly premium cost for such insurance $2.72 for single coverage and $5.67 for dependent coverage.

Section 2. The Company agrees to provide without cost to the employee the following:

> On or after July 1st, 1962 a group health and accident insurance program which provides sixty dollars ($60) a week for a maximum of twenty-six (26) weeks.

Section 3. An employee becomes eligible for group insurance six (6) calendar months following the date of employment providing that he has not been discharged or has not voluntarily left the employ of the Company during that six (6) months' period. The employee must, however, be actively employed and at work at the expiration date of said six (6) calendar months. If he is not at work and actively employed on that day, he will become eligible on the day at which he returns to work.

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Article XXXV.

Termination of Agreement

Section 1. The foregoing constitutes a complete Agreement on all questions of wages, hours, and working conditions between the Company and the Union. This Agreement shall become effective June 28, 1962, except as otherwise provided herein, and shall remain in full force and effect until midnight June 27, 1964, and from year to year thereafter unless either party desires to modify or terminate the Agreement, and files a notice in writing of its desire to terminate or modify at least sixty (60) days prior to Midnight June 27, 1964, or prior to Midnight June 27, of any subsequent year.

This Agreement is signed at Barberton, Ohio, this 29th day of July, 1962.

PITTSBURGH PLATE GLASS COMPANY
CHEMICAL DIVISION

(Signed)

W. S. Straub
W. R. Harris
J. M. Rodgers
W. D. Koblenzer
W. P. Lawrence

LOCAL UNION NO. 1
ALLIED CHEMICAL AND ALKALI
WORKERS OF AMERICA

(Signed)

Donald Walker
Wm. E. Williams
Alder Cikra
Richard D. Lowry
Roy C. Barnes

General Counsel Exhibit No. 4

PENSION AGREEMENT

PITTSBURGH PLATE GLASS COMPANY
CHEMICAL DIVISION
AND
LOCAL UNION NO. 1
ALLIED CHEMICAL AND ALKALI
WORKERS OF AMERICA

JULY 20, 1950
AMENDED JUNE 28, 1955
AMENDED JANUARY 1, 1960
AMENDED JUNE 28, 1962

BARBERTON, OHIO

• • • • • • • • • • •

The underscoring in the pages which follow indicate changes in the Pension Agreement as a result of 1962 negotiations.

PENSION AGREEMENT

Agreement between Pittsburgh Plate Glass Company, Chemical Division, Barberton, Ohio (referred to herein as the "Company"), and Allied Chemical and Alkali Workers of America Local No. 1 (referred to herein as the "Union"), amending the Pension Agreement between the parties dated July 20, 1950, as amended, (referred to herein as the "Pension Agreement").

The parties agree as follows:

Effective June 28, 1962, the Pension Agreement is amended to read in its entirety as follows:

Wherever used herein

(a) The term "existing labor agreement" means the labor agreement between the Company and the Union dated July 29, 1962.

(b) The term "Employee" means any employee of the Company at its Barberton plant who from time to time during the term of this Pension Agreement shall be in the bargaining unit covered by the existing labor agreement (hereinafter called "the bargaining unit") and who shall not have ceased to be an employee under the provisions of such labor agreement and shall include an employee whose continuous service, as defined in this Pension Agreement, as of the effective date of pension benefits as provided in paragraph B of PART II of this Pension Agreement, shall not have been broken within the meaning of Section 3 of PART I of this Pension Agreement.

(c) The term "pensioner" means a person who is retired under the terms of this Pension Agreement and who receives or is entitled to receive pension benefits described in PART I.

PART I

PENSION BENEFITS

Section 1—Eligibility

A. 1. Any Employee:

(i) who retires on or after June 28, 1962 and who on the date of his retirement (1) is actively employed (that is, on the current payroll) at the time of retirement within the bargaining unit, (2) has at least ten (10) years' continuous service, and (3) has attained the 65th anniversary of his birth, or

(ii) who retired on or after January 1, 1960 and prior to June 28, 1962, and who on the date of his retirement (1) was actively employed (that is, on the current payroll) at the time of retirement within the bargaining unit, (2) had at least ten (10) years' continuous service, and (3) had attained the 65th anniversary of his birth, or

(iii) who retired on or after June 28, 1950 and prior to January 1, 1960, and who was (1) actively employed (that is, on the current payroll) at the time of retirement within the bargaining unit, (2) had at least fifteen (15) years' continuous service, and (3) had attained the 65th anniversary of his birth, shall be eligible to receive a Normal Retirement Pension as provided in this Pension Agreement, unless such Employee has at any time received pension or relief benefits of any character under the Company's Voluntary Pension, Retirement Allowance and Relief Practices. For the purpose of determining eligibility for a Normal Retirement Pension, an Employee otherwise eligible hereunder who is absent due to shutdown, physical disability, official layoff, or official leave of absence shall, during the first five (5) years of such absence, be eligible to retire upon pension under this paragraph A-1 without returning to active employment in the bargaining unit, provided he shall not have ceased to be an Employee during said five (5) years pursuant to the practices and procedures under the existing labor agreement, or under any applicable future labor agreement then in effect, and provided further that such Employee's continuous service has not been broken as provided in subsections A and B of Section 3 of this PART I.

2. At any time prior to June 28, 1964, the Company shall have the right in its sole discretion to retire an eligible Employee upon pension on or after the 65th anniversary of his birth and an eligible Employee may retire on pension on or after the 65th anniversary of his birth without the consent of the Company. On and after June 28, 1964, retirement upon a pension of an eligible Employee who has attained the 65th anniversary of his birth shall be mandatory.

B. Any Employee:

(i) who on or after June 28, 1962 shall have attained the 60th anniversary of his birth and shall have had at least fifteen (15) years' continuous service or shall have had at least twenty (20) years' continuous service even though he has not attained the 60th anniversary of his birth and who through some unavoidable cause occurring thereafter and subsequent to June 27, 1962; or

(ii) who on or after January 1, 1960 but not later than June 27, 1964 shall have at least fifteen (15) years' continuous service prior to age 65 even though he had not attained age 60 and who through some unavoidable cause occurring thereafter and subsequent to January 1, 1960; or

(iii) who after June 27, 1950 and prior to January 1, 1960 shall have attained the 60th anniversary of his birth and shall have had at least fifteen (15) years' continuous service or shall have had at least twenty (20) years' continuous service even though he has not attained the 60th anniversary of his birth and who through some unavoidable cause occurring thereafter and subsequent to June 27, 1950,

shall have become totally and permanently disabled while in active employment (that is, on the current payroll) within the bargaining unit or within the first thirty (30) days of any layoff or leave of absence, shall be entitled to a Disability Pension upon his retirement as provided in this Pension Agreement.

(1) An Employee shall be deemed to be totally and permanently disabled (as the term "totally and permanently disabled" is used herein) and shall be retired only (a) if he has been totally and permanently disabled by bodily injury or disease so as to be prevented thereby from engaging in any substantially

gainful occupation or employment and (b) after such total and permanent disability shall have continued for a period of six (6) consecutive months and, in the opinion of a qualified physician selected by the Company, it will be total, permanent and continuous during the remainder of his life. Disability shall be deemed to have resulted from an unavoidable cause unless it (a) was contracted, suffered or incurred while the Employee was engaged in, or resulted from his having engaged in, a felonious criminal enterprise, or (b) resulted from his habitual drunkenness or addiction to narcotics, or (c) resulted from a self-inflicted injury. Total and permanent disability resulting from any of such enumerated causes, or from future service in the armed forces which prevents him from returning to employment with the Company and for which he receives a military pension, shall not entitle an Employee to a pension under this paragraph. Any pension for total and permanent disability under this Agreement shall continue only so long as such pensioner shall be totally and permanently disabled. The totality and permanency of disability may be verified by medical examination prior to age 65 at any reasonable time and from time to time.

(2) As a condition of an Employee's right to receive a Disability Pension under this agreement, he shall make proper application for Disability Benefits under the Federal Social Security Act.

C. The Company shall have the right to retire on a Disability Pension any Employee who meets the age and length of continuous service requirement set forth in paragraph B of this Section 1 and who, in the Company's opinion, is physically or mentally incapable of continuing employment. Such Employee shall, as a condition of his right to receive a Disability Pension, make proper application for Disability Benefits under the Federal Social Security Act.

D. Any Employee who on or after January 1, 1960 has attained the 60th but not the 65th anniversary of his birth and has fifteen (15) or more years of continuous service may be retired by mutual agreement between the Company and the Union, and subject to the conditions stated herein, shall be eligible to receive an Early Retirement-Mutual Pension. Such Employee, as a condition of receiving an Early Retirement-Mutual Pension, shall make proper application for Disability Benefits under the Federal Social Security Act when, and if, such Employee becomes totally and permanently disabled.

E. Any Employee who on or after June 28, 1962 has attained the 62nd but not the 65th anniversary of his birth and who has fifteen (15) or more years of continuous service may be retired at the sole option of the Company and, subject to the conditions stated herein, shall be eligible to receive an Early Retirement-Company Option Pension. Such Employee, as a condition of receiving an Early Retirement-Company Option Pension shall make proper application for Disability Benefits under the Federal Social Security Act when, and if, such Employee becomes totally and permanently disabled.

F. Any Employee who retires on or after January 1, 1960 and who on the date of his retirement (1) was actively employed (that is, on the current payroll) at the time of retirement within the bargaining unit, (2) has at least fifteen (15) years' continuous service and (3) has attained the 60th but not the 65th anniversary of his birth, shall be eligible to receive an Early Retirement Pension.

G. An Employee who is actively employed (that is, on the current payroll) on or after January 1, 1960 and whose employment is terminted on or after January 1, 1960, and after he has attained the 40th anniversary of his birth, and who at the time of such termination has fifteen (15) or more years of continuous service credited under the Pension Agreement, shall be eligible upon application to receive a

deferred vested Normal Retirement Pension, provided that at that time such application is made he has attained the 65th anniversary of his birth, is not employed by the Company and is not eligible for or receiving any other type of retirement or disability benefit from the Company or under this Pension Agreement.

H. Each application for a pension shall be in writing on a form provided by the Board refered to in Section 4 of this PART I and shall be made to such Board or to such representative as may be designated bmy it for the purpose. The Board may require any applicant for a pension to furnish to it such information as may reasonably be required.

Section 2—Amount of Pensions

A. Subject to the provisions of paragraphs B, C, D, E, F, G, and H of this Section 2—

(1) The amount of the Normal Retirement Pension payable under paragraph A-1(i) or paragraph 2 of Section 1 of this PART I shall be $2.50 per month multiplied by the number of years of continuous service credited prior to June 28, 1962 plus $2.80 per month multiplied by the number of years of continuous service credited on or after June 28, 1962.

(2) The amount of the Normal Retirement Pension payable under paragraph A-1(ii) of Section 1 of this PART I shall be $2.25 per month multiplied by the number of years of continuous service credited prior to January 1, 1960 plus $2.50 per month multiplied by the number of years of continuous service credited on or after January 1, 1960.

(3) The amount of the Normal Retirement Pension payable under paragraph A-1(iii) of Section 1 of this PART I shall be $2.20 per month multiplied by the number of years of continuous service credited up to and including a maximum of thirty (30).

(4) The amount of the Disability Pension payable to an Employee who retires on or after June 28, 1962 under paragraph B(i) or paragraph C of Section 1 of this PART I shall be $5.00 per month multiplied by the number of years of continuous service credited prior to June 28, 1962 plus $5.60 per month multiplied by the number of years of continuous service credited after June 27, 1962; provided, however, that in any month for which a retired Employee is eligible for either disability or old age benefits payable under the Federal Social Security Act, his monthly Disability Pension prior to age 65 and his Normal Retirement Pension when he attains age 65 will be computed in accordance with the formula in clause A(1) of this Section 2.

(5) The amount of the Disability Pension payable to an Employee who retires on or after January 1, 1960 under paragraph B(ii) of paragraph C of Section 1 of this PART I shall be $4.50 per month multiplied by the number of years of continuous service credited prior to January 1, 1960 plus $5.00 per month multiplied by the number of years of continuous service credited on or after January 1, 1960; provided, however, that in any month for which a retired Employee is eligible for either disability or old age benefits payable under the Federal Social Security Act, his monthly Disability Pension prior to age 65 and his Normal Retirement Pension when he attains age 65 will be computed in accordance with the formula in clause A(2) of this Section 2.

(6) (a) The amount of the Disability Pension payable to an Employee who retired prior to January 1, 1960 under paragraph B(iii) or paragraph C of Section 1 of this PART I shall be $88.00 per month, provided, however, that such disability pensioner who when he attains the 65th anniversary of his birth, is receiving a Disability Pension under said

paragraph B(iii) (or is eligible for such a Disability Pension in all respects except that he is eligible to receive Federal Old Age Insurance Benefits) shall thereupon, in lieu of any Disability Pension under this Agreement, be entitled to a pension computed under clause A(3) of this Section 2.

(b) One-Half of any disability payment in the nature of a pension under any Federal or State law, including the Federal Social Security Act as the same may be amended from time to time, shall be charged against the amount of any Disability Pension payable under clause (6) (a) of Section 2-A of this PART I for the period corresponding to the period to which such other amount or payment is applicable but not beyond age 65.

(7) The amount of the Deferred Vested Normal Retirement Pension payable under paragraph G of Section 1 of this PART I shall be computed in Clause A(1) of this Section 2.

(8) The amount of the Eearly Retirement-Mutual Pension payable under paragraph D of Section 1 of this PART I shall be $4.50 per month multipled by the number of years of continuous service credited prior to January 1, 1960 plus $5.00 per month multipled by the number of years of continuous service credited after December 31, 1959; provided, however, that in any month for which a retired Employee is eligible for either disability or old age benefits payable under the Federal Social Security Act, his monthly Early Retirement-Mutual Pension prior to age 65 and his Normal Retirement Pension when he attains age 65 will be computed in accordance with the formula in Clause A(1) of this Section 2.

(9) The amount of the Early Retirement-Company Option Pension payable under paragraph E of Section 1 of this PART I shall be $5.00 per month multiplied

by the number of years of continuous service credited prior to June 28, 1962 plus $5.60 per month multiplied by the number of years of continuous service credited on or after June 28, 1962; provided, however, that for any month after such retired Employee attains age 65 or attains the qualifying age for an unreduced benefit by reason of age under the Federal Social Security Act or becomes eligible for a disability pension benefit under such Act, whichever occurs first, his monthly retirement benefit payable thereafter shall be recomputed as a Normal Retirement Pension in accordance with Section 2-A (1) above.

(10) Any Employee entitled to benefits under paragraphs B, C, D, or E of Section 1 of this PART I will receive the entire amount of such pension until such time as he receives payment for disability under the Federal Social Security Act at which time the Company shall withhold all subsequent pension payments until such time as the Company has recovered the full amount of the difference between the pension paid under paragraphs B, C, D, or E and the redetermined amount of the applicable Normal Retirement Pension for the period corresponding to the period to which the Federal Social Security Act disability payments were applicable.

(11) The amount of the Early Retirement Pension payable under paragraph F of Section 1 of this PART I shall be computed in accordance with the formula in clause A(1) of this Section 2 based on his years of continuous service at the time of his retirement, reduced by 6/10 of 1% for each complete calendar month by which such Employee is under the age of 65 at the time of his retirement.

B. Each pension shall be paid in monthly installments. The first monthly installment of any pension due shall be payable during the month next following the month in which

an Employee shall retire, provided that application for pension is made not later than the close of the month following retirement; otherwise the pension shall commence with the first day of any subsequent calendar month in which application for pension is made, and the last monthly installment of such pension shall be payable for the month in which the death of such pensioner shall occur.

C. If any pensioner is or shall become, or upon application would become, entitled to any other pension or payment in the nature of a pension, other than primary insurance benefits under the Social Security Act, from any source or fund to which source or fund the Company shall have contributed (any such other pension or payment in the nature of pension being hereinafter referred to as Other Pension), then the amount of the pension payable to such pensioner under this Pension Agreement for any period shall be reduced by the amount of any Such Other Pension paid or payable to him or that would upon application become payable to him during the time any pension is payable under this Pension Agreement; provided, however, that, if such pensioner shall have contributed to the source or fund out of which such Other Pension shall be paid or become payable or would become payable upon application, then the amount by which the pension payable pursuant to this Pension Agreement for any period shall be reduced in accordance with the foregoing provisions of this paragraph C shall be decreased by the amount of that part of such Other Pension during the time any pension is payable under this Agreement which shall be attributable to the contributions which such person shall have made to such source or fund.

D. If any pensioner is or shall become entitled to or shall be paid any discharge, liquidation or dismissal or severance allowance or payment of similar kind to which the Company shall have contributed, or by reason of any present or futur elaw, as the same may be amended from time to time, of the United States of America or of any foreign

country, or of any state, district, territory or subdivision of, or subject to the jurisdiction of any of the foregoing, then the total amount paid or payable to him in respect of any such allowance or payment shall be deducted from the amount of any pension for the period corresponding to the period which such allowance or payment is applicable, to which such pensioner would be entitled under this Pension Agreement; provided, however, that if such pensioner shall have contributed to the source or fund out of which such allowance or payment shall be paid or become payable, then the amount which shall be deducted from or charged against the amount of any such pension in accordance with the foregoing provisions of this paragraph D shall be decreased by the amount of that part of such allowance or payment which shall be attributable to the contributions which such pensioner shall have made to such source or fund.

It is further understood that monthly payments for total and permanent disability, under group life policies, will not be deducted from a pension payable under this Pension Agreement, but, if an Employee who receives such payments later recovers and is able to return to work, such group life insurance policies will not be reinstated.

E. Any amount paid to or on behalf of any Employee or pensioner on account of injury or occupational disease causing disability in the nature of a permanent disability for which the Company is liable, whether pursuant to Workmen's Compensation or occupational disease laws, or arising otherwise from the statutory or common law (except fixed statutory payments for the loss of any bodily member) and any such payments on account of employment by an employer other than the Company, and any disability payment in the nature of a pension under any federal or state law, other than the Federal Social Security Act as the same may be amended from time to time, and other than a pension granted for or on account of military service, shall be deducted from or charged against the amount of

any pension payable under this PART I for the period corresponding to the period to which such other amount or payment is applicable; provided, however, that (except where the Employee has elected to receive a lump sum payment in lieu of periodic payments) deductions for all such amounts or payments shall be made only with respect to the period they are actually paid to such Employee. A lump sum payment elected in lieu of periodic payments shall be deducted from the amount of pension benefits for periods and in amounts equivalent to the periods and amounts for which such lump sum payment is a substitute.

F. In lieu of the Normal Retirement Pension payable under the provisions of clause (1) of paragraph A of this Section 2, an Employee who will become eligible for a Normal Retirement Pension (and who has never received a Disability Pension) may elect at any time and from time to time prior to the 64th anniversary of his birth to receive upon retirement, a reduced pension during his own life time and during the remaining life time of one surviving person named by him as a contingent annuitant, payable in an amount determined under Option 1 or Option 2 below, provided written notice of his election of a reduced pension and designation of the contingent annuitant is filed with the Pension Board at least one year before such Employee attains age 65; provided, however, that Employees who will have attained age 64 prior to June 1, 1960 may exercise the foregoing election at any time prior to June 1, 1960 or within three months after the approvals provided for in Paragraph B of PART II of this Agreement have been obtained, whichever is later.

Election of such reduced pension and designation of a contingent annuitant may not be revoked during the year preceding the 65th anniversary of such Employee's birth, nor thereafter, except that if the designated contingent annuitant dies during such year, the election will be automatically revoked and such Employee shall then have the right within one month of such death but prior to the 65th

anniversary of his birth, to again file with the Pension Board a written notice of his election of a reduced pension and designation of a contingent annuitant.

If a designated contingent annuitant dies subsequent to the 65th anniversary of the Employee's birth and prior to the first day of the first month with respect to which such Employee's pension is payable, the Employee's election to receive a reduced pension shall be automatically revoked and he shall have no further right to name a contingent annuitant. If the Employee dies prior to the first day of the first month with respect to which such Employee's pension is payable, the contingent annuitant shall have no right to any pension payments.

The Company agrees to give each Employee notice at least six months prior to the 64th anniversary of his birth of his right to elect such reduced pension.

Option 1—A reduced pension payable during the pensioner's life and after his death payable in the same amount during the life of, and to, the contingent annuitant.

The reduced pension shall be in an amount determined by multiplying the pension computed under the provisions of clause (1) of paragraph A of this Section 2 by a factor of .70 if the Employee's age and the contingent annuitant's age are the same (age of each determined as being the attained age at his or her last birthday prior to the date of the Employee's retirement). Such factor shall be increased by .01 for each year that the contingent annuitant's age thus determined exceeds the Employee's age (but the factor used shall never exceed unity) and shall be decreased by .01 for each year that the contingent annuitant's age thus determined is less than the Employee's age.

Option 2—A reduced pension payable during the pensioner's life, and after his death payable at one-half of rate of the reduced pension during the life of, and to, the contingent annuitant.

The reduced pension shall be in an amount determined by multiplying the pension computed under the provisions of clause (1) of paragraph A of this Section 2 by a factor of .85 if the Employee's age and the contingent annuitant's age are the same (age of each determined as being the attained age at his or her last birthday prior to the date of the Employee's retirement). Such factor shall be increased .01 for each year that the contingent annuitant's age thus determined exceeds the Employee's age (but the factor used shall never exceed unity) and shall be decreased by .01 for each year that the contingent annuitant's age thus determined is less than the Employee's age.

Section 3—Determination of Continuous Service

A. The term "continuous service" as used in this PART I, with respect to the period prior to June 28, 1950, means years and months of plant seniority established in accordance with the procedures and practices under the existing labor agreement.

B. The term "continuous service" as used in this PART I, with respect to the period beginning on June 28, 1950, and thereafter, means service in the bargining unit as set forth in the existing labor agreement prior to retirement calculated from the Employee's last hiring date in the bargaining unit or June 28, 1950, if his last hiring date was prior to June 28, 1950, (this means in the case of a break in continuous service after June 27, 1950, continuous service shall be calculated from the date of reemployment in the bargaining unit following the last break in continuous service) in accordance with the following provisions:

(1) Continuous service in any calendar year shall be credited at the rate of 1/12 of a year for every full

140 hours (and subsequent to June 30, 1955 for every full 135 hours) actually worked as an Employee in the bargaining unit during such calendar year, provided, however, that an Employee may not receive continuous service credit of more than six months in the period June 28 to December 31, 1950, nor of more than twelve months in any succeeding calendar year. Except as provided in paragraphs C, G, H, I and J of this Section 3 of this PART I, no continuous service shall be credited for any period not actually worked as an Employee in the bargaining unit.

(2) Continuous service shall be broken in the event that an Employee ceases to be an Employee pursuant to the practices and procedures under the existing labor agreement or under any applicable future labor agreement in effect at such time. Any Employee who fails to return to work at such time or times as required pursuant to the practices and procedures under the existing labor agreement, or under any such applicable future labor agreement in effect at such date, shall thereupon cease to be an Employee.

C. Where an Employee, other than a temporary Employee, enters the military service of the United States, is discharged or relieved from active service under conditions other than dishonorable, and returns to active employment within ninety (90) days after such discharge or relief, such absence shall not constitute a break in continuous service, but for the purpose of computing the amount of his pension, only the period of service rendered in time of war or pursuant to a national conscription law plus not to exceed ninety (90) days shall be considered, and years of continuous service shall be credited at the rate of 1/12 of a year for each full calendar month of such period of service. For the purposes of this paragraph, the term "military service" shall be construed to include service in the merchant marine of the United States.

D. Continuous service shall not include service of employees in the employ of any company whose stocks or properties may be acquired hereafter by the Company or service of employees in other plants of the Company.

E. Continuous service and all breaks in continuous service within the meaning of this PART I shall be determined from the payroll records, personnel records, operating records, and other records of the Company. In any case continuous service and breaks in continuous service, all within the meaning of this PART I shall be determined from such sources of information, by such statistical calculations as may be reasonably adequate for the purpose, and/or in any manner by which the closest possible approximation of continuous service and breaks in continuous service may be made. Nothwithstanding the foregoing, for the period prior to June 28, 1950, continuous service within the meaning of this PART I shall be conclusively determined by records of plant seniority established in accordance with the procedures and practices under the existing labor agreement to the extent that seniority has been so established.

F. Beginning with the year 1951 the Company shall, not later than April 1 of each year, give to each Employee and to the Union a statement of the Employee's continuous service from the commencement thereof to the end of the preceding calendar year or from the date of the last previous statement to the end of the preceding calendar year, as the case may be. The record of continuous service shown on each such statement shall be final and binding upon the Employee, the Union and the Company with respect to his continuous service unless the Union shall by notice in writing to the Company delivered within thirty (30) days after April 1 in the year in which such statement is delivered, dissent from the record of continuous service shown by such statement. The record of continuous service statement shall advise the Employee of this thirty (30) day limitation. In case of such dissent and

in case the Company and the Union cannot agree upon the length of continuous service, either the Company or the Union may submit the question to arbitration under Section 5 of this PART I within sixty days following the Union's notice of dissent; otherwise, said statement of continuous service shall be final and binding as aforesaid. A final and binding statement of continuous service, as above provided, shall not be later questioned even though such statement be incorporated in a subsequent statement of further continuous service.

G. An Employee who is absent from work for periods during which he is engaged in Union business with Company representatives shall receive continuous service credit equal to the number of working hours so lost. An Employee shall be considered as being engaged in Union business with Company representatives when preparing for or engaging in joint Union-Management Labor Relations Committee meetings, contract negotiations, consideration of Company proposals, or arbitration proceedings, even though Company representatives are not actually present.

H. The following provisions with respect to continuous service shall be applicable to one Employee selected to serve as a full-time Union Representative and who devotes his full time to the duties of such position.

(1) Service of such an Employee selected as the full-time Union Representative shall not give him any continuous service credit under this Pension Agreement if he is not on a leave of absence to fill such position granted by the Company, pursuant to the practices and procedures under the existing labor agreement or any applicable future labor agreement.

(2) Years of continuous service shall be credited to such Employee at the rate of 1/12 of a year for each calendar month of service in such office under such a leave of absence from the Company.

(3) If any such Employee ceases to hold such posion and devote his full time thereto without reporting for work within the bargaining unit within thirty days after ceasing to hold such position or to devote his full time thereto, his continuous service under this Pension Agreement shall thereby be broken. If at the time such Employee ceases to hold such position he is delayed from returning to active employment due to sickness or accident, such thirty-day limit will be extended until he is able to return to work.

(4) Any such Employee who at the date of his retirement under the said Pension Agreement holds the office of full-time Union Representative under a Company-granted leave of absence from the bargaining unit shall be deemed to be employed within the bargaining unit within the meaning of paragraph A of Section 1 of PART I of this Pension Agreement.

(5) The pension payable under this Pension Agreement to any such Employee shall be computed as provided in this PART I reduced by the subtractions specified in Section 2 of this PART I, and there shall also be subtracted from such pension payable any pension or other payments which such Employee may receive from the Union applicable to the corresponding period during which a pension is payable to him under this Pension Agreement.

(6) An Employee shall not receive continuous service credit under the provisions of this paragraph H and also under paragraph A or paragraph B of this Section 3 for the same period of time.

(7) Continuous service under this paragraph H shall be credited to not more than one Employee for the same period of time.

I. An Employee who, either before, on, or after June 28, 1950, serves as an hourly supervisor or in a salaried position

in the plant and who returns to the bargaining unit and retires therefrom shall receive continuous service credit at the rate of 1/12 of a year for each full calendar month of service as such a supervisor or in such a salaried position, for which he does not receive continuous service credit pursuant to paragraph A or B of this Section 3, provided that a pension payable to such Employee under paragraph A of Section 1 of this PART I shall be reduced by the amount of old age retirement benefits payable to such Employee which are attributable to contributions made by the Company.

J. An Employee who, subsequent to June 28, 1955 is absent from his work because of jury duty for which he receives compensation under the then current labor agreement between the parties, or because of injury or disease sustained in the course of employment with the Company and for which he receives Workmen's Compensation or occupational disease benefits, shall be credited, for the purpose of computing his continuous service under the provisions of clause (1) of paragraph B of this Section 3, at the rate of 40 hours per week for the period he would otherwise have been scheduled to work for the Company during such absence.

K. The Company shall have the right in its sole discretion to determine that any Employee who has been retired for disability has recovered from such disability and to reemploy such Employee. In the event of such reemployment the Disability Pension of such Employee shall cease, and such Employee shall be credited with his continuous service as at the date of his prior retirement for disability plus continuous service from the date of such reemployment calculated in accordance with paragraph B of Section 3 of this PART I, for the purpose of calculating any subsequent pension benefits to which he may become entitled.

L. If a pensioner under paragraph A of Section 1 of this PART I is reemployed by the Company, his pension shall cease. Upon subsequent retirement he shall be credited with

the continuous service which he had at the date of his previous retirement plus any continuous service accumulated since the date of his reemployment.

Section 4—Administration

The administration of the pension benefits shall be in charge of a Board (herein referred to as the "Board"), which shall consist of such members from management, and shall have such authority and perform such duties, as may be determined from time to time by the Company.

Section 5—Appeals Procedure

A. If any difference shall arise between the Company or the Board and any Employee who shall be an applicant for a pension as to:

(1) the number of years of continuous service of such applicant; or

(2) the age of such applicant; or

(3) whether an applicant for a pension on the ground of total and permanent disability under paragraph B of Section 1 of this PART I shall have become disabled by reason of unavoidable cause as defined in said paragraph B; or

(4) whether a totally and permanently disabled Employee under paragraph B of Section 1 of this PART I is engaging in any substantially gainful occupation or employment; or

(5) whether an Employee is physically or mentally incapable of continuing employment, within the meaning of paragraph C of Section 1 of the PART I;

and agreement cannot be reached between the Company or the Board and a representative of the Union, either the

Company or the Union may refer such question for final and binding decision to an Arbitrator to be selected as follows:

The Company and the Union, promptly after execution of this Pension Agreement, shall endeavor to agree upon a panel of three arbitrators. If, at the end of twenty (20) days after such execution, they have not agreed upon the panel of three arbitrators, they shall request the American Arbitration Association and the Federal Mediation and Conciliation Service each to submit to the parties a list of five qualified arbitrators. The names received from these two agencies shall be added to the list of names agreed to by the parties, if any. Prompty thereafter, the Company and the Union shall strike names from the list in the following manner: The Company and the Union shall determine by lot the order in which they will strike names, and thereafter each shall in that order alternately eliminate one name until only three names remain on the list, and those three shall thereupon constitute the Arbitration Panel during the period of this Pension Agreement or any extension thereof.

The party desiring to refer the question to arbitration shall transmit a notice to the opposite party, by registered mail, return receipt requested, within ten (10) days after the Company has given the Union its final answer in writing with respect to such question. Within five (5) days after receipt of such notice by the opposite party the two parties shall meet to select the Arbitrator. Each party shall strike one name in secret from separate copies of the Panel list of three and if, after comparison of the two lists by the parties, more than one name remains unstruck, the Arbitrator shall be chosen by lot from those remaining names.

Each party may appoint a representative who shall be entitled to sit with the Arbitrator during the hearing and during the consideration of the decision; but those representatives shall not vote on the decision.

The Arbitrator shall render a decision in writing and shall deliver a copy or copies to each party within twenty-

five (25) days from the date of his appointment, unless the parties agree to extend this time.

The Arbitrator shall not change or modify this Pension Agreement, or have any authority in the making of a new agreement. His authority shall be limited to the question referred to in clauses (1), (2), (3), (4), and (5) of this paragraph A of this Section 5.

Either party who appoints a representative shall pay his fees and expenses. The fees and expenses of the Arbitrator and all the costs of the hearing shall be divided equally between the parties.

B. If any difference shall arise between the Company and any Employee as to whether such Employee is or continues to be totally and permanently disabled within the meaning of paragraph B of Section 1 of the PART I, such differences shall be resolved as follows:

The Employee shall be examined by a physician appointed for the purpose by the Company and by a physician appointed for the purpose by a duly authorized representative of the Union. If they shall disagree concerning whether the Employee is or continues to be totally and permanently disabled, that question shall be submitted to a third physician selected by such two physicians. The medical opinion of the third physician, after examination of the Employee and consultation with the other two physicians, shall decide such question. The fees and expenses of the third physician shall be shared equally by the Company and the Union.

Section 6—Payment of Pension Benefits

The Company shall be free from time to time during the term of this Pension Agreement to determine or vary the manner and means of making provision for paying the pension benefits set forth in Part I of this Pension Agreement. While the Company shall be free from time to time during the term of this Pension Agreement to create such reserve

or reserves, trust or trusts, or to purchase such annuity or annuities with respect to the whole or any part of this Pension Agreement as the Company may elect, there shall be no obligation so to do.

Section 7—Miscellaneous

A. No pension properly payable to a pensioner pursuant to this PART I shall be discontinued or reduced except as provided in paragraph 7 of Section 2 of this PART I, in paragraphs H, I, K, and L of Section 3 of this PART I, and in paragraph F of this Section 7.

B. No Employee prior to his retirement under conditions of eligibility for pension benefits shall have any right or interest in or to any portion of any funds which the Company may have heretofore provided, or may hereafter elect to provide, for the purpose of paying pensions and no Employee or pensioner shall have any right to pension benefits except to the extent provided in this PART I. The Company's rights to discipline or discharge, subject to the existing labor agreement, shall not be affected by reason of the provisions of the preceding sentence or any other provision contained in this Pension Agreement.

C. No Employee who at any time shall have received retirement or relief benefits under the Company's Voluntary Pension, Retirement and Relief Practices shall be eligible to receive any pension benefits under this Pension Agreement. The Company's Voluntary Pension, Retirement and Relief Practices, including practices with respect to periodic review of eligibility for relief payments, will continue for Employees receiving benefits under such practices prior to June 28, 1950. On and after June 28, 1950, no other Employee shall receive any pension or other similar benefit from the Company except in accordance with the terms of this Pension Agreement.

D. The Company shall not be required to do any act by virtue of any of the provisions of this Pension Agreement

that is or hereafter may be prohibited by any law, including the laws of the State of incorporation of the Company.

E. Within one year after July 20, 1950 each Employee employed within the bargaining unit as of that date, and after said date each Employee hired or transferred into the bargaining unit at his hiring or transfer date, must submit to the Personnel Office of the Plant where the Employee is employed evidence satisfactory to the Board as to his correct age. If any Employee fails to submit evidence satisfactory to the Board within such time limit, the Company may refer the question of the correct age of such Employee to final and binding arbitration pursuant to paragraph A of Section 5 of this PART I.

F. Each pensioner shall be responsible for furnishing the Company with the address to which he wishes his pension checks mailed. If any pension check mailed to the last such address appearing on the Company's records is returned because the addressee is not at this address, and if pensioner does not contact the Company or a period of five (5) years thereafter, he shall forfeit all claims to pension benefits or payments beginning with the first such payment which was returned to the Company.

G. The Company shall furnish annually to the Union and the Employees a report regarding pension benefits paid as provided in PART I of this Pension Agreement.

PART II

GENERAL PROVISIONS

A. So long as the provisions of PART I of this Pension Agreement shall continue in effect, without modification or change:

(1) neither the Union nor any of the officers or representatives of the Union nor any Employee shall make any request that the pension benefits or any provisions of this Pension Agreement be changed in any respect or

terminated or that new pension or similar benefits be established or that the amount which the Company is required by the provisions of PART I of this Pension Agreement to pay or cause to be paid or provided for pension benefits for the Employees be increased; nor

(2) shall the Union or any of the officers or representatives of the Union or any Employee engage in or in any manner assist or encourage any strike, sitdown slowdown or work stoppage for the purpose of securing any such increase or any change or other action with respect to pensions; and during the term of this Pension Agreement the Company shall not have any obligation to negotiate or bargain with the Union with respect to any of the matters covered by or relating to clause (1) or (2) of this paragraph A of PART II. If any Employee or group of Employees represented by the Union should violate the intent of clause (1) or (2) of this paragraph A of PART II, the Union through its proper officers will promptly notify the Company and such Employee or Employees, in writing, of its disapproval of such violation; nor

(3) shall the Company engage in any lockout during the term of this Pension Agreement because of a dispute with respect to any matter in this Pension Agreement; provided, however, that nothing in this paragraph A shall prohibit the Union from striking if the Company shall violate clause (3) of this paragraph A or the Company from engaging in a lockout if the Union shall violate clause (2) of this paragraph A.

B. This Amended Pension Agreement shall become effective as of June 28, 1962 and shall remain in effect without modification or change until Midnight, June 27, 1967 upon which date it shall automatically terminate, unless there is then in effect a current labor agreement in which case this agreement shall be extended to expire at the same time as the labor agreement, or unless the Company and the Union

agree to the contrary; provided, however, that this Pension Agreement is contingent upon and subject to obtaining such approvals of the Board of Directors and the shareholders of the Company, as the Company in its sole discretion shall consider necessary and it is also contingent upon and subject to obtaining and retaining approvals of the Commissioner of Internal Revenue of the deductibility for income tax purposes of any and all payments made or to be made by the Company hereunder, and of the manner and means of making provisions for paying the pension benefits as being tax exempt under the provisions of Section 401 or other applicable provisions of the Internal Revenue Code or as such Code may from time to time be amended. The Company will exert its best efforts to obtain promptly the approvals referred to above.

This Amended Pension Agreement executed this 29th day of July, 1962 at Akron, Ohio.

ALLIED CHEMICAL AND ALKALI
WORKERS OF AMERICA, LOCAL No. 1

Donald Walker

William E. Williams

Richard D. Lowry

Alder Cikra

Roy C. Barnes

PITTSBURGH PLATE GLASS COMPANY
CHEMICAL DIVISION

W. S. Straub

W. R. Harris

J. M. Rodgers

W. D. Koblenzer

General Counsel Exhibit No. 5

PENSIONERS:

Effective November 1, 1964, for those employees who retired after June 27, 1962, and who elect to continue their program of Hospitalization and Surgical Insurance, the Company will increase its current contribution Two Dollars ($2.00), which total amount of Four Dollars ($4.00) shall be applicable only toward the cost of the program of Hospitalization and Surgical Insurance.

If Medicare or a program of Government type insurance is adopted this additional Two Dollars ($2.00) would no longer be applicable.

General Counsel Exhibit No. 6

(Excerpts)

AGREEMENT

PITTSBURGH PLATE GLASS COMPANY
CHEMICAL DIVISION
AND
LOCAL UNION No. 1
ALLIED CHEMICAL AND ALKALI
WORKERS OF AMERICA

OCTOBER 20, 1964

BARBERTON, OHIO

* * * * * * * * * * *

ARTICLE 1.—PURPOSE

Section 1. It is the intent and purpose of the parties hereto, that this agreement shall promote and improve industrial and economic relations, will establish a basis for securing cooperation and goodwill between the Company, the Union and the employees, and to set forth herein, the basic agreement covering rates of pay, hours of work and conditions of employment to be observed between the parties, and shall cover the employment of persons employed by the Pittsburgh Plate Glass Company, Chemical Division Plant at Barberton, Ohio, covered by this Agreement.

Section 2. In consideration of the obligations assumed by the Company in this Agreement, the Union is in accord with the objective of achieving in this plant maximum productivity per employee during the term of this Agreement in order that the Company may receive a fair day's work for a fair day's pay as provided for in this Agreement.

Section 3. It is mutually understood that the terms and conditions relating to the employment of workers covered by this Agreement have been decided upon by collective bargaining.

Section 4. During the life of this Agreement the Company will not enter into any contract with any employee or group of employees, or with any other employees' organization in the Pittsburgh Plate Glass Company, Chemical Division Plant at Barberton, Ohio, which would supersede the provisions of this Agreement.

Section 5. The Company and the Union shall comply with the hours of labor and rates of pay and other conditions of employment prescribed by this Agreement.

Section 6. The Company shall not reclassify employees or duties or occupations performed nor engage in any activity for the purpose of defeating or evading the provisions of this Agreement.

Article II.—Recognition

Section 1. The Company recognizes the Union as the exclusive representative of all the employees in the Pittsburgh Plate Glass Company, Chemical Division Plant at Barberton, Ohio, working on hourly rates of pay, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other working conditions of employment.

Section 2. It is understood that all hourly employees in the position of group leaders or temporary hourly foremen as distinguished from supervisors are to come under the provisions of the contract, however, hourly group leaders or temporary hourly foremen shall not be permitted to ad-

minister the grievance procedure of the Labor Agreement, issue warnings or invoke discipline against an employee; however, this will in no way affect the right of the temporary hourly foremen or group leaders to direct the work force.

Section 3. The term "regular employee" as used in this Agreement shall not include any salaried employee or any employee who has not passed his plant probation period of forty (40) actual working days, except as otherwise provided herein.

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ARTICLE XXXI.

INSURANCE BENEFITS

Section 1. Effective November 1, 1964, the Company agrees to provide a policy or policies of group hospitalization and surgical benefits insurance including medical and major-medical coverage for employees and their family dependents who are eligible for and elect such coverage and, a program of Group Life Insurance for eligible male employees. The Insurance Benefits furnished under this Section 1 will be at no cost to active employees for single or dependent coverage.

Section 2. The Company agrees to provide without cost to the employee the following:

> On or after November 1, 1964, a group health and accident insurance program which provides sixty-five ($65) a week for a maximum of twenty-six (26) weeks.

Section 3. An employee becomes eligible for group insurance six (6) calendar months following the date of employment providing that he has not been discharged or has not voluntarily left the employ of the Company during that six (6) months' period. The employee must, however, be actively employed and at work at the expiration date of said six (6) calendar months. If he is not at work and actively employed on that day, he will become eligible on the day at which he returns to work.

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Article XXXV.

Termination of Agreement

Section 1. The foregoing constitutes a complete Agreement on all questions of wages, hours, and working conditions between the Company and the Union. This agreement shall become effective October 20, 1964 except as otherwise provided herein, and shall remain in full force and effect until midnight October 19, 1967, and from year to year thereafter unless either party desires to modify or terminate the Agreement, and files a notice in writing of its desire to terminate or modify at least sixty (60) days prior to Midnight October 19, 1967, or prior to Midnight October 19, of any subsequent year.

This Agreement is signed at Barberton, Ohio, this 20th day of October, 1964.

PITTSBURGH PLATE GLASS COMPANY
CHEMICAL DIVISION
(Signed)

W. R. Harris
J. M. Rodgers
L. J. Rimlinger
M. W. Jones
W. D. Koblenzer
W. P. Lawrence

LOCAL UNION NO. 1
ALLIED CHEMICAL AND ALKALI
WORKERS OF AMERICA
(Signed)

William E. Williams
Alder Cikra
Richard D. Lowry
Donald Walker
James Campbell

General Counsel Exhibit No. 7

PITTSBURGH PLATE GLASS COMPANY
CHEMICAL DIVISION

PPG chemicals — Barberton, Ohio

J. M. Rodgers
Director of Industrial Relations — March 24, 1966

Mr. W. E. Williams, Vice President
Allied Chemical & Alkali Workers of America
Local Union No. 1
959-961 Wooster Road West
Barberton, Ohio

Dear Bill:

As you requested, the following is an explanation of the application of the Non-Duplication of Benefits provision applicable to the Pensioners' Hospitalization-Medical program of insurance.

Benefits payable under such circumstances shall be paid so as to provide for possible full payment of allowable expenses on a claim for a retired employee or his covered dependent with concurrent coverage under another group plan, but shall not exceed the total of such allowable expenses.

Also, we have attached copies of the letters we have mailed to our pensioners, which are self-explanatory, and which we advised you we would furnish as a matter of information.

Yours very truly,

JOHN
J. M. Rodgers

JMR-chw

IDENTIFICATION OF LETTERS—

No. 1—To retirees who do not have Insurance coverage.

No. 2—Retirees carrying a plan of Insurance to which the Company makes no contribution.

No. 3—Retirees carrying a plan of Insurance to which the Company makes a contribution.

No. 4—Retirees under age 65 carrying a plan of Insurance to which the Company makes no contribution.

No. 5—Retirees under age 65 carrying a plan of Insurance to which the Company makes a contribution.

#1

PITTSBURGH PLATE GLASS COMPANY
CHEMICAL DIVISION

PPG chemicals

Barberton, Ohio

W. R. Harris
Works Manager

March 24, 1966

Dear Pensioner:

The matter of your Hospital-Medical Insurance is of the utmost importance to you; therefore, we recommend that you read this letter carefully.

The program of Hospital and Medical benefits under the Federal Social Security Act, known as Medicare will become effective on July 1, 1966. Any person who has attained age 65, whether they ever worked and were covered by Social Security or not will be eligible to receive benefits under this program.

Hospital Benefits under Medicare will be received automatically by any person 65 years of age or over; no enrollment or payment of premiums is required. However, Medical Benefits are voluntary and do require enrollment and the payment of a premium of $3.00 a month per person.

Enrollment for Medical Benefits must be completed by March 31, 1966, otherwise, enrollment will be delayed to a future date and benefits will be lost.

As a Pensioner of the Pittsburgh Plate Glass Company, you have not been enrolled in any program of Hospitalization-Medical Insurance furnished by the Company.

We are pleased to inform you that, effective in July 1966, the Pittsburgh Plate Glass Company will make a contribution to you of three dollars ($3.00) a month toward the cost of your Social Security Hospital-Medical program of Insurance.

Yours very truly,

W. R. HARRIS
W. R. Harris

#2

PITTSBURGH PLATE GLASS COMPANY
CHEMICAL DIVISION

PPG chemicals — Barberton, Ohio

W. R. Harris
Works Manager — March 24, 1966

Dear Pensioner:

The matter of your Hospital-Medical Insurance is of the utmost importance to you; therefore, we recommend that you read this letter carefully.

The program of Hospital and Medical benefits under the Federal Social Security Act, known as Medicare will become effective on July 1, 1966. Any person who has attained age 65, whether they ever worked and were covered by Social Security or not will be eligible to receive benefits under this program.

Hospital Benefits under Medicare will be received automatically by any person 65 years of age or over; no enrollment or payment of premiums is required. However, Medical Benefits are voluntary and do require enrollment and the payment of a premium of $3.00 a month per person. Enrollment for Medical Benefits must be completed by March 31, 1966, otherwise, enrollment will be delayed to a future date and benefits will be lost.

You are urged to enroll for the Medical Benefits available to you if you have not already done so, and if you have any questions concerning the program, contact your nearest Social Security office, but do so before the initial deadline of March 31, 1966.

As a pensioner of the Pittsburgh Plate Glass Company, a program of Hospitalization-Medical Insurance has been made available to you, as furnished by the Equitable Life Assurance Society.

Your participation in this program of Insurance for either single coverage or for coverage for you and your spouse has been a voluntary election on your part, and enrollment has been conditioned on your timely payment of the full monthly premium for the type coverage you elected to carry.

Should you elect to continue your present coverage after the Social Security Hospital-Medical plan becomes effective in July 1966, the same benefits as outlined in the Certificate of Insurance will continue. We must remind you, however, in considering continuance of your present program of Hospitalization and Medical Insurance that, with respect to this plan there will be no duplication of benefits that are also paid for under the Medicare program.

The Company would like also to inform you that should you elect to voluntarily discontinue your enrollment in the present Hospitalization-Medical Program of Insurance, effective July 1966, when the Social Security Hospital-

Medical program goes into effect, or in a subsequent month, thereafter your current monthly premiums would no longer be deducted from your pension check and the full amount will be available to you.

Further, in the event you do elect to discontinue your present enrollment, the Company will then make a contribution of three dollars ($3.00) per month to you, which amount would cover the current individual cost to you for your Social Security enrollment.

In the event you elect to discontinue your present enrollment, but your spouse is under age 65, and not yet eligible for the Social Security Hospital-Medical program you may elect to continue her in the present program of Insurance as currently furnished by the Equitable Life Assurance Society, until she reaches age 65 or becomes eligible for the Social Security Hospital-Medical Program. In order to enroll her in this manner you must notify the Company and timely pay the full cost of the premium for single coverage for your spouse. The initial cost of this coverage will be $5.71 per month effective July 1, 1966.

If you have any questions concerning this matter, you may contact Mr. Frank Ruehling in the Insurance Department at the Barberton Plant.

Yours very truly,

W. R. Harris
W. R. Harris

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PITTSBURGH PLATE GLASS COMPANY
CHEMICAL DIVISION

PPG chemicals

W. R. Harris
Works Manager

Barberton, Ohio

March 24, 1966

Dear Pensioner:

The matter of your Hospital-Medical Insurance is of the utmost importance to you; therefore, we recommend that you read this letter carefully.

The program of Hospital and Medical benefits under the Federal Social Security Act, known as Medicare will become effective on July 1, 1966. Any person who has attained age 65, whether they ever worked and were covered by Social Security or not will be eligible to receive benefits under this program.

Hospital Benefits under Medicare will be received automatically by any person 65 years of age or over; no enrollment or payment of premiums is required. However, Medical Benefits are voluntary and do require enrollment and the payment of a premium of $3.00 a month per person. Enrollment for Medical Benefits must be completed by March 31, 1966, otherwise, enrollment will be delayed to a future date and benefits will be lost.

You are urged to enroll for the Medical Benefits available to you if you have not already done so, and if you have any questions concerning the program, contact your nearest Social Security office, but do so before the initial deadline of March 31, 1966.

As a pensioner of the Pittsburgh Plate Glass Company, a program of Hospitalization-Medical Insurance has been made available to you, as furnished by the Equitable Life Assurance Society.

Your participation in this program of Insurance for either single coverage or for coverage for you and your spouse has been a voluntary election on your part, and enrollment has been conditioned on your timely payment of the full monthly premiums for the type coverage you elected to carry.

It is necessary to inform you at this time, that in your case, the program of Insurance provides that the current Company monthly contribution of $4.00 will be reduced to a $2.00 monthly contribution when the Social Security-Medicare benefits become available in July 1966. This is in accordance with prior arrangements on this matter.

Should you elect to continue your present coverage after the Social Security Hospital-Medical plan becomes effective in July 1966, the same benefits as outlined in the Certificate of Insurance will continue. We must remind you, however, in considering continuance of your present program of Hospitalization and Medical Insurance that, with respect to this plan there will be no duplication of benefits that are also paid for under the Medicare program.

The Company would like also to inform you that should you elect to voluntarily discontinue your enrollment in the present Hospitalization-Medical Program of Insurance, effective July 1966, when the Social Security Hospital-Medical program goes into effect, or in a subsequent month, thereafter your current monthly premiums would no longer be deducted from your pension check and the full amount will be available to you.

Further, in the event you do elect to discontinue your present enrollment, the Company will then make a contribution of three dollars ($3.00) per month to you, which amount would cover the current individual cost to you for your Social Security enrollment.

In the event you elect to discontinue your present enrollment, but your spouse is under age 65, and not yet eligible

for the Social Security Hospital-Medical program you may elect to continue her in the present program of Insurance as currently furnished by the Equitable Life Assurance Society until she reaches age 65 or becomes eligible for the Social Security Hospital-Medical Program. In order to enroll her in this manner you must notify the Company and timely pay the full cost of the premium for single coverage for your spouse. The initial cost of this coverage will be $5.71 per month effective July 1, 1966.

If you have any questions concerning this matter, you may contact Mr. Frank Ruehling in the Insurance Department at the Barberton Plant.

Yours very truly,

W. R. HARRIS
W. R. Harris

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PITTSBURGH PLATE GLASS COMPANY
CHEMICAL DIVISION

PPG Chemicals
W. R. Harris
Works Manager

Barberton, Ohio

March 24, 1966

Dear Pensioner:

The matter of your Hospital-Medical Insurance is of the utmost importance to you; therefore, we recommend that you read this letter carefully.

The program of Hospital and Medical benefits under the Federal Social Security Act, known as Medicare will become effective on July 1, 1966. Any person who has attained age 65, whether they ever worked and were covered by Social Security or not will be eligible to receive benefits under this program.

Hospital Benefits under Medicare will be received automatically by any person 65 years of age or over; no enrollment or payment of premiums is required. However, Medical Benefits are voluntary and do require enrollment and the payment of a premium of $3.00 a month per person. Enrollment for Medical Benefits must be completed by March 31, 1966, otherwise, enrollment will be delayed to a future date and benefits will be lost.

You are urged to enroll for the Medical benefits available to you as soon as you become eligible since at present you are under 65 years of age. If you have any questions concerning the program, contact your nearest Social Security office when appropriate to do so.

As a pensioner who at present is under age 65, you have been enrolled in a program of Hospitalization-Medical Insurance, as furnished by the Equitable Life Assurance Society, your participation in this program of Insurance for either single coverage or for coverage for you and your spouse has been a voluntary election on your part, and enrollment has been conditioned on your timely payment of the full monthly premium for the type coverage you elected to carry.

Should you elect to continue your present coverage after you become age 65 and are eligible for the Social Security Hospital-Medical program, the same benefits as outlined in the certificate of Insurance will continue. We must remind you, however, in considering continuance of your present program of Hospitalization and Medical Insurance that, with respect to this plan there will be no duplication of benefits that are also paid for under the Medicare program.

The Company would like also to inform you that upon reaching age 65, should you elect to voluntarily discontinue your enrollment in the present Hospitalization Medical program of insurance then your monthly premiums would no longer be deducted from your pension check, and the full

amount will be available to you following your withdrawal from the plan.

In the event you do elect to discontinue your present enrollment, after you reach age 65, the Company will then make a contribution of three dollars ($3.00) per month to you, which amount would cover the current individual cost to you for your Social Security enrollment.

If after you reach age 65 and elect to discontinue your present enrollment, but your spouse is under age 65, and not yet eligible for the Social Security Hospital-Medical program you may elect to continue her in the present program of Insurance as currently furnished by the Equitable Life Assurance Society, until she reaches age 65 or becomes eligible for the Social Security Hospital-Medical Program. In order to enroll her in this manner you must notify the Company and timely pay the full cost of the premium for single coverage for your spouse. The initial cost of this coverage will be $5.71 per month effective July 1, 1966.

If you have any questions concerning this matter, you may contact Mr. Frank Ruehling in the Insurance Department at the Barberton Plant.

Yours very truly,

W. R. HARRIS
W. R. Harris

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PITTSBURGH PLATE GLASS COMPANY
CHEMICAL DIVISION

PPG chemicals — Barberton, Ohio

W. R. Harris
Works Manager — March 24, 1966

Dear Pensioner:

The matter of your Hospital-Medical Insurance is of the utmost importance to you; therefore, we recommend that you read this letter carefully.

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You are urged to enroll for the Medical benefits available to you as soon as you become eligible since at present you are under 65 years of age. If you have any questions concerning the program, contact your nearest Social Security office when appropriate to do so.

As a pensioner who at present is under age 65, you have been enrolled in a program of Hospitalization-Medical Insurance, as furnished by the Equitable Life Assurance Society, your participation in this program of Insurance for either single coverage or for coverage for you and your spouse has been a voluntary election on your part, and

enrollment has been conditioned on your timely payment of the full monthly premium for the type coverage you elected to carry.

It is necessary to inform you at this time, that in your case, the program of Insurance provides that the current Company monthly contribution of $4.00 will be reduced to a $2.00 monthly contribution when Social Security Hospital-Medical benefits program goes into effect in July 1966. This is in accordance with prior arrangements on this matter. However, this reduction will not take place until the month following the month in which you become age 65 or are eligible for Social Security Hospital-Medical benefits.

Should you elect to continue your present coverage after you become age 65 and are eligible for the Social Security Hospital-Medical Program, the same benefits as outlined in the Certfiicate of Insurance will continue. We must remind you, however, in considering continuance of your present program of Hospitalization and Medical Insurance that, with respect to this plan there will be no duplication of benefits that are also paid for under the Medicare program.

The Company would like also to inform you that upon reaching age 65, should you elect to voluntarily discontinue your enrollment in the present Hospitalization Medical program of insurance then your monthly premiums would no longer be deducted from your pension check, and the full amount will be available to you following your withdrawal from the plan.

In the event you do elect to discontinue your present enrollment, after you reach age 65, the Company will then make a contribution of three dollars ($3.00) per month to you, which amount would cover the current individual cost to you for your Social Security enrollment.

If after you reach age 65 and elect to discontinue your present enrollment, but your spouse is under age 65, and not yet eligible for the Social Security Hospital-Medical program you may elect to continue her in the present pro-

gram of Insurance as currently furnished by the Equitable Life Assurance Society, until she reaches age 65 or becomes eligible for the Social Security Hospital-Medical Program. In order to enroll her in this manner you must notify the Company and timely pay the full cost of the premium for single coverage for your spouse. The initial cost of this coverage will be $5.71 per month effective July 1, 1966.

If you have any questions concerning this matter, you may contact Mr. Frank Ruehling in the Insurance Department at the Barberton Plant.

Yours very truly,

W. R. HARRIS
W. R. Harris

General Counsel Exhibit No. 8

The Pittsburgh Plate Glass Company, Chemical Division, Barberton, Ohio (referred to herein as the "Company") and Local Union No. 1 of the Allied Chemical and Alkali Workers of America (herein after referred to as the "Union") have entered into an Extension Agreement and

1. The current Labor Agreement between the parties dated October 20, 1964 and
2. The Pension Agreement between the parties executed, as amended, July 29, 1962

are hereby extended and shall remain in full force and effect until midnight—October 19, 1970.

1966

Wages: Effective on the date of October 20, 1966 wage rates will be increased as follows:

	Wages as of 10/20/1966
4¢ —	$2.76 to $3.00
5¢ —	$3.01 to $3.23
6¢ —	$3.24 and above.

Pension Improvements: Pension benefits effective November 1, 1966 equal to those which became effective in the Lake Charles Agreement on May 16, 1966, for those employees who retire subsequent to the date of this extension agreement.

Benefit	Now	New
Normal Benefit	$2.80-$2.50	$4.25 for those who retire subsequent to this Agreement.
Vesting	15 Years—Age 40	10 years service and age 40 or 15 years service regardless of age.
Early Reduced Pension	15 years and age 60 reduced .6 of 1% for each month under age 65.	10 years and age 60 reduced 5/9 of 1% for each calendar month under age 65 or at least age 55 plus service = 85—same.
Total Disability Definition	Prevented from engaging in any substantially gainful employment.	Unable to perform least job in the plant.
Total Disability Benefits	15 years and age 60 or 20 years regardless of age—two times normal benefits reduced to normal at age 65 or when eligible for Social Security benefits.	15 years service at any age—two times normal benefits reduced to normal at age 65 or when eligible for Social Security benefits.
Automatic Survivor Benefits	None	A surviving spouse, upon application, shall automatically be eligible to receive a survivor income benefit upon the death of an employee a) who dies on or after November 1, 1966 and b) on or after attaining age 60 with ten or more years of continuous service, or attaining age 55 if his combined years of age and credited service (to the nearest 1/12 in each case) total 85 or more, before the first day of the month following the date on which he retires, and

Benefit	Now	New
		c) who, if he had retired at the date of his death, would have been eligible to receive a Normal Retirement Pension or an Early Retirement Pension under this Pension Agreement. The term "surviving spouse" shall mean the person who is the employee's spouse at the time of his death and who had been his spouse for at least one year immediately prior to his death. The amount of the automatic survivor pension benefit shall be equal to 55% of a) an amount determined by multiplying the monthly pension benefit otherwise payable to the Employee, if he had retired on a Normal or Early Retirement Pension on the date of his death by 90% if the employee's age and that of his spouse are the same. Such percentage (90%) shall be increased by one-half of one percent (½%) (up to a maximum of 100%) for each 12 months that the age of the spouse exceeds the employee's age and shall be decreased by one-half of one percent (½%) for each twelve months that the age of the spouse is less than the employee's age. No payment of the automatic survivor pension benefit shall be payable with respect to the first 24 months following the month in which the employee dies. The Automatic Survivor Benefit as provided in this Agreement shall not be applicable in any case in which at the time of an employee's death an election of a reduced pension and designation of a contingent annuitant under this agreement shall be valid and effective.

1967

Wages: Effective October 20, 1967 wage rates will be increased as follows:

	Wages as of 10/20/1967
9¢ —	$2.80 to $3.05
10¢ —	$3.06 to $3.29
11¢ —	$3.30 and up.

Vacations:

Effective January 1, 1967 an improved vacation to provide:

Two (2) weeks vacation after one (1) years service.
Three (3) weeks vacation after five (5) years service.
Four (4) weeks vacation after ten (10) years service.
Five (5) weeks vacation after twenty (20) years service.

1968

Wages: Effective on the date of October 20, 1968 wage rates will be increased as follows:

	Wages as of 10/20/1968
8¢ —	$2.89 - $3.15
9¢ —	$3.16 - $3.40
10¢ —	$3.41 and up.

Holiday: One additional Holiday (Washington's birthday) making a total of nine (9) paid Holidays during the calendar year 1968 and thereafter.

1969

Wages: Effective on the date of October 20, 1969 wage rates will be increased as follows:

	Wages as of 10/20/1969
7¢ —	$2.97 to $3.24
8¢ —	$3.25 to $3.50
9¢ —	$3.51 and up.

Future Pensioners:

Effective with the first of the month following the effective date of this Extension Agreement, the Company will contribute three dollars ($3.00) per month to employees who retire subsequent to the date of this Agreement toward the cost of Medicare if they are not covered under the current Hospitalization Insurance plan for retirees.

All others terms and conditions of the old agreement except as expressly provided for are hereby incorporated into this new Agreement.

Signed this ..... day of .....1966.

For the Union:	For the Company:
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

Company Exhibit No. 1

MEMORANDUM AGREEMENT

The following has been agreed to between the Company and the Union:

1) All regular full-time employees during the year 1959 who are on the current payroll on the effective date of this Agreement shall receive eight (8) hours pay at their regular straight time hourly rate in lieu of an eighth paid holiday for the year 1959. The hourly rate will include those adjustments due November 1, 1959, under the Labor Agreement.

2) The group life insurance provided for under Article XXXI of the Labor Agreement for active employees shall,

upon retirement, be reduced to two thousand dollars ($2,000) for male employees and to fifteen hundred dollars ($1500) for female employees. Employees who elect to continue such insurance upon retirement, as provided herein, will pay the specified premium for such group life insurance.

3) For employees who retire on or after January 1, 1960, the Company will make available a policy or policies of group hospitalization and surgical benefits insurance for the pensioner and dependent wife for which the pensioner will pay the applicable premium rate, and which will provide a group hospitalization benefit of $14 per day for a maximum of 70 days and 20 times the daily benefit for in-hospital extras, in-hospital medical care benefits of $5 per day for a maximum of 70 days and a group surgical insurance benefit schedule with a maxmium benefit of $200. The initial rate for the above coverage will be eight dollars and eighteen cents ($8.18) per month.

Executed this 6th day of January, 1960.

LOCAL UNION No. 1 ALLIED CHEMICAL AND ALKALI WORKERS OF AMERICA	COLUMBIA-SOUTHERN CHEMICAL CORPORATION
(Signed)	(Signed)
/s/ DONALD WALKER	/s/ J. M. RODGERS

Company Exhibit No. 2

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 8-RC-270

In the Matter of

PITTSBURGH PLATE GLASS COMPANY, COLUMBIA CHEMICAL DIVISION, *Employer*

and

ALLIED CHEMICAL AND ALKALI WORKERS OF AMERICA, LOCAL NO. 1, *Petitioner*

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed, hearing in this case was held at Barberton, Ohio, on September 30, 1948, before Charles A. Fleming, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-man panel consisting of the undersigned Board Members.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the National Labor Relations Act.

2. The Petitioner and the Intervenor are labor organizations which claim to represent certain employees of the Employer.

3. The question concerning representation:

On June 27, 1948, the Intervenor and the Employer entered into a collective bargaining agreement to terminate

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1 Local 13013, District 50, affiliated with the United Mine Workers of America, hereinafter called the Intervenor, was allowed to intervene at the hearing by the hearing officer on the ground of a contract between the Intervenor and the Employer.

on June 27, 1950. On August 7, 1948, the officers of Local 13013 called a special meeting of the local, duly noticed, and a vote was taken to disaffiliate from the Intervenor, surrender the charter and dissolve the local. At the same meeting the members voted to organize Local No. 1, Allied Chemical and Alkali Workers of America, the Petitioner herein, now claiming to be the successor to Local 13013. Of the 1,600 employees at the plant and mine of the Employer approximately 1,100 were dues paying members of the Petitioner at the time of the hearing. The former officers of the Intervenor became the newly elected officers of the Petitioner. The former office of the Intervenor has been taken over by the Petitioner and regular meetings are held. The Intervenor conceded at the hearing that it had no officers or dues paying members at the Employer's plant or mine and that it had no office at Barberton, Ohio, and held no meetings. However, the Intervenor's representative at the hearing stated that Local 13013 was still in existence, and that it had established an office at Akron, Ohio, and was prepared to handle grievances of the Employer's employees. The Petitioner by letter dated August 14, 1948, requested recognition by the Employer as the exclusive bargaining representative of the employees. In a letter dated August 16, 1948, the Employer refused to recognize the Petitioner. The Intervenor contends that its existing contract with the Employer is a bar to the instant petition.

We find no merit in this contention. It is clear on the foregoing facts that there exists a doubt as to the identity of the labor organization that the employees desire to represent them which can best be resolved by an election. Under such circumstances we have held that an existing contract does not constitute a bar to a present determination of representatives.[2]

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[2] See *Matter of Olive & Myers Manufacturing Company*, 59 N.L.R.B. 650; *Matter of Revere Copper & Brass, Incorporated*, 67 N.L.R.B. 1114; *Matter of Carson Pirie Scott & Company*, 69 N.L.R.B. 935; *Matter of Foley Lumber & Export Corporation*, 70 N.L.R.B. 73; *Matter of Riggs Optical Company, Consolidated*, 77 N.L.R.B. 265.

We find that a question affecting commerce exists concerning the representation of employees of the Employer, within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. In accordance with the agreement of the parties, we find that all employees of the Employer's plant and limestone mine at Barberton, Ohio, working on hourly rates, including group leaders who work on hourly rates of pay, but excluding salaried employees and supervisors within the meaning of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Direction of Election [3]

As part of the investigation to ascertain representatives for the purposes of collective bargaining with Pittsburgh Plate Glass Co., Columbia Chemical Division, Barberton, Ohio, an election by secret ballot shall be conducted as early as possible, but not later than thirty days (30) from the date of this Direction, under the direction and supervision of the Regional Director for the Eighth Region, and subject to Sections 203.61 and 203.62 of National Labor Relations Board Rules and Regulations—Series 5, as amended, among the employees in the unit found appropriate in paragraph numbered 4, above, who were employed during the pay-roll period immediately preceding the date of this Direction, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, but excluding those employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election, and also excluding employees on strike who are not entitled to reinstatement,

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[3] Having failed to achieve compliance or to initiate steps for compliance with the filing requirements of Section 9 (f), (g), and (h), of the amended Act, the Intervenor will not be accorded a place on the ballot. See *Matter of Cardinal Products, Inc.*, 80 N.L.R.B., No. 23.

to determine whether or not they desire to be represented by Local No. 1, Allied Chemical and Alkali Workers of America, for the purposes of collective bargaining.

Signed at Washington, D. C., this 16th day of December 1948.

PAUL M. HERZOG, *Chairman*
JOHN M. HOUSTON, *Member*
ABE MURDOCK, *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Company Exhibit No. 5

MEMORANDUM AGREEMENT

The Company agrees to provide a reduced Hospitalization and Surgical plan for employees retiring after June 27, 1962, for which employees will pay the full amount of premium. For employees who elect to continue this reduced coverage, the Company will make a contribution of $2.00 per month (to each such employee) which amount shall be applicable only toward the cost of the Hospitalization and Surgical plan. The initial cost of this Hospitalization plan will be $11.41 per month for the Pensioner and his spouse.

In addition, all employees who retire after June 27, 1962, will receive $2,000 Life Insurance coverage at no cost to the employee.

Signed this 29th day of July 1962.

ALLIED CHEMICAL AND ALKALI
WORKERS OF AMERICA
DONALD WALKER

PITTSBURGH PLATE GLASS COMPANY
CHEMICAL DIVISION
J. M. RODGERS

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

BEFORE THE NATIONAL LABOR RELATIONS BOARD
EIGHTH REGION

Case No. 8-CA-4202

In the Matter of:

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION
and
LOCAL UNION NO. 1, ALLIED CHEMICAL AND ALKALI WORKERS OF AMERICA

Court Room No. 5,
Ninth Floor,
Municipal Building,
Akron, Ohio,
Tuesday, January 17, 1967

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock a.m.

BEFORE:

JAMES V. CONSTANTINE, Esq., Trial Examiner.

APPEARANCE:

RICHARD A. DUROSE, Esq., 720 Bulkley Building, 1501 Euclid Avenue, Cleveland, Ohio, appearing on behalf of the Counsel, for the General Counsel.

MORTIMER RIEMER, Esq., 2217 The Illuminating Building, 55 Public Square, Cleveland, Ohio 44113, appearing on behalf of the Charging Party.

MARK C. CURRAN, Esq., Assistant Counsel for the Pittsburgh Plate Glass Company, One Gateway Center, Pittsburgh, Pennsylvania 15222, appearing on behalf of the Respondent.

* * * * * * * * * *

[3] PROCEEDINGS

• • • • • • • • • • • •

[4] Mr. DuRose: Mark this.

(The documents above-referred to were marked General Counsel's Exhibit No. 1(a) through 1(g) for identification.)

Trial Examiner: Go ahead, Mr. DuRose.

• • • • • • • • • • • •

[5] Trial Examiner: In the absence of an objection, let them be received into evidence.

Will you mark them received, Mr. Reporter?

(The documents above-referred to heretofore marked General Counsel's Exhibit No. 1(a) through 1(g), were received in evidence.)

• • • • • • • • • • • •

William E. Williams

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

Trial Examiner: Take that chair there (indicating) and give your name and address to the reporter.

The Witness: William E. Williams, 4424 Roop, R-o-o-p, Avenue, Barberton, Ohio.

Direct Examination

Q. (By Mr. DuRose) Mr. Williams, do you hold any position [6] with the Allied Chemical and Alkali Workers of America, Local No. 1? A. Yes.

Q. What is that position? A. I'm Vice-President and Chairman of the Union's Labor Relations Committee.

Trial Examiner: I don't want to interrupt but let me tell you something that has always been helpful to counsel.

Mr. DuRose: Yes.

Trial Examiner: This goes for all of you.

If you put a witness on and you want to identify him and his position, you don't have to ask him questions, just put the words in his mouth with leading questions. In other words, it is permissible to do so in preliminary matters.

Go ahead.

Q. (By Mr. DuRose) How long has the Union represented the employees at the Barberton plant? A. The Allied Chemical and Alkali Workers has been the representative of the group since January of 1949.

Q. How long have you been an officer of the Union? A. I was an officer in the Union prior to the Allied Chemical and I have been an officer in the Allied Chemical since 1950, with the exception of from August 1957 until March '58 when I was not in office.

Q. You have been in office since 1958 continuously? [7] A. Yes, I have.

Q. How long has this Union bargained for the collective bargaining agreements with the Company? A. Since January of 1949.

Q. And how long has there been a medical insurance plan for employees? A. We had insurance, the first written document or the first time the insurance was written into the contract as such was in 1948. We had a contributory insurance plan prior to 1948, but it was not written in the contract.

Q. Now, when was the first time that retired employees were permitted to participate in medical insurance? A. They began participation when we negotiated our first pension agreement in the summer of 1950.

Q. And what were the circumstances by which retired employees could participate? A. We had a verbal agreement, the Union and the Company, on the insurance benefits for retired employees. This came as a result of the collective bargaining for a new contract and a pension agreement.

Q. And was there any contribution by the Company towards the premium? A. I don't know, the Company said

there was not. Our people were supposedly paying the premium, at least there was a stipulated premium and the retirees paid it.

[8] Q. And how did the retirees go about paying that amount of money? A. Well, I'm not exactly sure how they did it, on the check of the retirees. This was taken from their total pension through their bookkeeping system in the general office, I assume. I think this was the way it was done.

Q. It was withheld from the pension fund? A. Yes.

Q. All right. Now, after that, when if at any time was there a change in the retired employees health insurance plan? A. The next change occurred in 1960. Actually, the discussion on it started in 1959, it was consummated in an agreement in 1960.

In the fall of 1959, we met with the Company's representatives for the purpose of trying to reach an agreement on extending the then current labor agreement and in extending that labor agreement, we arrived at some modifications in the Pension Agreement which included the insurance for the pensioners.

Q. What was the change in the insurance? A. The hospitalization benefits were increased from a ten-dollar plan to a fourteen-dollar plan.

Q. The benefits were increased? A. The benefits were increased, yes.

[9] Q. And after that, after that was there anything put in writing at that time concerning the health insurance for retirees? A. Not in 1960, no.

Q. When was the next time that there was any agreement made between the Company and the Union concerning retired employees health insurance? A. In 1962, again we were meeting with the Company on a labor contract. Our contract was terminating, and we were meeting in regards to a negotiation of a new contract. Our Pension Agreement was a closed agreement, it would have been run until 1965, but in the negotiations for the labor agreement, we agreed to certain modifications in the Pension Agreement.

Q. What were those? What was the agreement, what were the changes? A. Well, we made certain modifications in the allowance per month per year of service and other general matters embodied in the Pension Agreement itself. We made no change in the insurance benefits as such.

We did reach an agreement that the Company would contribute two dollars toward the cost of the premium of anybody who retired on or after June 28th, 1962.

Mr. DuRose: Would you mark this General Counsel's 2, please?

[10] (The document above-referred to was marked General Counsel's Exhibit No. 2 for identification.)

Q. (By Mr. DuRose) Was this agreement put in writing? A. Yes, it was.

Q. Handing you what has been marked for identification as General Counsel's Exhibit 2, I'll ask you if you can identify it, please. A. Yes, I can. This is the agreement that was reached with regards to the pension benefits at that time.

Mr. DuRose: Here's an extra copy (handing paper to counsel for Respondent).

Mr. Curran: This is what?

Mr. DuRose: G. C. 2.

I move that General Counsel's Exhibit 2 be received in the record.

Mr. Curran: No objection.

Mr. Riemer: No objection.

Trial Examiner: All right, it's received in the absence of objections.

(The document above-referred to heretofore marked General Counsel's Exhibit No. 2, was received in evidence.)

Q. (By Mr. DuRose) I note that General Counsel's 2 is dated July 29, 1962. Was there any other agreement between the Company and the Union that was signed on that day? [11] A. Yes, the new labor agreement was signed on

July 29th, to run for a period of two years until June 27th, 1964.

Mr. DuRose: Mark this No. 3.

(The document above-referred to was marked General Counsel's Exhibit No. 3 for identification.)

Q. (By Mr. DuRose) I hand you what has been marked for identification as General Counsel's Exhibit 3 and ask you to please identify that, please. A. Yes, I can.

Q. What is this? A. This is a copy of the labor agreement that was signed on July 29th, 1962.

Mr. DuRose: General Counsel moves that the General Counsel's Exhibit 3 be received in the record.

Mr. Curran: No objection.

Trial Examiner: I can't hear you, Mr. Curran.

Mr. Curran: No objection.

Trial Examiner: Mr. Riemer?

Mr. Riemer: No objection.

Trial Examiner: All right, it will be received in the absence of an objection.

(The document above-referred to heretofore marked General Counsel's Exhibit No. 3, was received in evidence.)

Q. (By Mr. DuRose) Was there anything else signed on that [12] day? A. Yes, a modified Pension Agreement was signed on that day.

Mr. DuRose: G. C. 4, please.

(The document above-referred to was marked General Counsel's Exhibit No. 4 for identification.)

Q. (By Mr. DuRose) I'm handing you what has been marked for identification as General Counsel's Exhibit 4 and ask if you can identify this. A. Yes, this is a copy of the Pension Agreement as it was amended and signed on July 29th, 1962.

Q. I notice on the front cover of the Pension Agreement, it says, "Amended June 28, 1962." Can you explain that? A. Yes, the modification to the Pension Agreement was ac-

tually signed at the same time the labor agreement was signed, but it carried back to the expiration date, June 28th.

Q. The Pension Agreement was retroactive to June 28th? A. Yes.

Mr. DuRose: I move now that G. C. Exhibit 4 be received in the record.

Mr. Curran: No objection.

Mr. Riemer: No objection.

Trial Examiner: All right, it will be received.

[13] (The document above-referred to heretofore marked General Counsel's Exhibit No. 4, was received in evidence.)

Q. (By Mr. DuRose) After 1962, did the Company and the Union arrive at any other agreements concerning medical insurance for retirees? A. Yes, we did.

In 1964, during the meetings and negotiations for a new labor agreement, we agreed to a modification on the insurance for pensioners, only to the extent of the agreement of the Company agreeing with us to increase their contributions towards the cost of the premiums of the insurance for pensioners to four dollars or an extra two dollars for those who retired on or after November 1, 1964.

Q. Was there anything on the agreement—was there anything else written into the agreement? A. Yes, the agreement also provided that this two dollars could be reclaimed by the Company in the event that a Medicare program was eventually set up under the Social Security system.

Q. Was this agreement put into writing? A. This agreement was put in writing, yes.

Q. And where was it placed? A. Well, as we concluded negotiations in our final sessions, we had a booklet which carried the modifications to the labor agreement that had been agreed to, certain mutual [14] understandings in connection with the labor agreement, including this item on the Pension Agreement, and it was placed in that booklet along with the other understandings.

Mr. DuRose: Mark this G. C. 5.

(The document above-referred to was marked General Counsel's Exhibit No. 5 for identification.)

Q. (By Mr. DuRose) I'm handing you what has been marked for identification as G. C. No. 5 and I'll ask you if you can identify that, please. A. Yes, this is a copy of the agreement reached at that time.

Q. That you just stated was placed in the booklet? A. It was placed in the booklet, yes.

Mr. DuRose: General Counsel moves that General Counsel's Exhibit No. 5 be admitted into the record.

Mr. Curran: No objection.

Mr. Riemer: No objection.

Trial Examiner: All right, it will be received.

(The document above-referred to heretofore marked General Counsel's Exhibit No. 5, was received in evidence.)

Q. (By Mr. DuRose) You stated that this agreement was reached at approximately the same time that a collective bargaining agreement was reached? A. Yes, we reached an agreement on the collective bargaining agreement for October 20, 1964. This particular [15] agreement on the pension contribution was made effective November 1st because we were about two-thirds of the way through the month at that time and the pensioners' checks had already been received for the month of October.

Mr. DuRose: Mark this G. C. 6.

(The document above-referred to was marked General Counsel's Exhibit No. 6 for identification.)

Q. (By Mr. DuRose) I hand you what has been marked for identification as General Counsel's Exhibit No. 6 and ask if you can identify it, please. A. Yes, this is a copy of the labor agreement that was reached October 20, 1964.

Q. Can you tell what the termination date of this contract is? A. This contract will terminate October 19th, 1967.

Mr. DuRose: General Counsel moves that General Counsel's Exhibit No. 6 be admitted into the record.

Mr. Curran: No objection.

Mr. Riemer: No objection.

Trial Examiner: Very well, it will be received in evidence.

(The document above-referred to heretofore marked General Counsel's Exhibit No. 6, was received in evidence.)

Q. (By Mr. DuRose) After that contract was signed, did the Union and the Company have any further discussions concerning [16] medical insurance? A. Yes, we did.

In 1965, in the tail end of summer and the early part of fall, we were in a series of meetings with the Company in Akron concerning grievances, application of the contract, and so on. At the tail end of these discussions on November 23rd, as we were winding up the discussions, we asked the Company to sit down with the Union and work out a program of insurance that would give our pensioners coverage on the benefits not covered by the Medicare program.

When we asked the question, the Company indicated that this was a general office matter, that they would take the question under advisement and give us an answer at an appropriate time.

Q. Do you recall who it was who made that statement? A. Yes, Mr. Rodgers, the Company's Industrial Relations Director.

Q. His first name is John? A. John, yes, sir.

Q. After this, was there any further discussion concerning the health insurance for pensioners at that time? A. No, not at that time.

We heard nothing from the question that we had asked the Company, during the balance of 1965. Sometime prior to the week—well, sometime prior to March 21st, I was in a [17] conversation——

Trial Examiner: What year is this?

The Witness: 1966, sir.

Trial Examiner: All right.

A. (continuing) I was in a conversation with the Company's Labor Relations supervisor, a Mr. David Redle, and during the course of several subjects that he and I had discussed, I referred to the fact that—we were actually discussing the length of time that it was taking us to get some answers to some questions that we've had raised, and I made reference to the fact to him that we raised the question to the Company the previous November regarding the Company's sitting down and discussing a program of in-

surance for the retirees to give benefits not covered by the Medicare.

He advised me he knew nothing about this situation, was not familiar with it, but that he would pass it on to the proper people, and I told him I wasn't raising it at that time for it to be passed on to anybody. I was merely using it as a reference point.

Q. Let me ask you a question:

Backing for a minute, at the time of your November 23rd discussion, had Medicare been passed by Congress? A. Yes.

Trial Examiner: I'm a little confused. Now, he's gotten to, I think, this November 23rd discussion.

[18] Mr. Curran: Yes.

Mr. Riemer: '65.

Trial Examiner: I thought you were going into '66?

Mr. DuRose: No, I was backing up.

Trial Examiner: I wish you would remember to mention the year you're talking about, it's easier on me.

All right, go ahead.

Q. (By Mr. DuRose) After you talked to Mr. Redle in March 1966, did you have any further discussions with anyone from the Company concerning this problem? A. Yes, on the morning of March 21st, I received a call from Mr. John Rodgers, the Industrial Relations Director, in which he advised me that my comments to Mr. Redle had been passed on to him and that he had passed them on to the Plant Manager, Mr. William Harris.

He said that Mr. Harris had asked him to call, that he would like to have him meeting with the Union's committee at 3:00 o'clock that afternoon if it was agreeable with the Union.

I told him I was agreeable and we did meet at 3:00 o'clock.

Q. Where did you meet? A. We met in the Company's conference room adjacent or right across the hall from the Plant Manager Mr. Harris's office.

[19] Q. Who was there representing the Union? A. Other than myself, there was the president of the Union, Mr. Blouir——

Q. Spell that last name, please. A. Mr. Blouir, B-l-o-u-i-r. (continuing)—Mr. Lowry, a committeeman, L-o-w-r-y; Mr. Campbell, a committeeman; and Mr. Rudd, R-u-d-d, a committeeman.

Q. Who was there representing the Company? A. Mr. Harris, the Plant Manager, and Mr. Rodgers, the Industrial Relations Director.

Q. That's William Harris? A. Yes.

Q. How long did this meeting last? A. The meeting was scheduled to begin at 3:00 and it terminated roughly at 4:00 o'clock. I think it was about three or four minutes to 4:00 but approximately 4:00 o'clock.

Q. Can you tell us then what happened at the meeting at 3:00 o'clock? A. Well, when the meeting finally began, Mr. Harris was the first one to speak and he told us he had some things he would like to pass on to us of a general nature for the Union's information and he cited six or seven different things that he felt would be of some interest for the Union to know.

[20] One had to do with the deduction of withholding tax. The Company was setting up its machinery to make the deductions on changes that had been made. He wanted to let us know that there might be some confusion because of these deductions until the Company finally got the bugs worked out of the machinery to make the deductions——

Trial Examiner: I think it would be better if you got right to the meat of the thing——

Mr. DuRose: All right.

Trial Examiner: —unless these other matters are also important.

I don't mean to tell you how to try your case. As I read this Complaint, it's the insurance program which is at issue. Why don't you ask him what discussions they have had, if any, on that, rather than have him give us the entire discussion?

Mr. DuRose: All right.

Q. (By Mr. DuRose) What was said at the meeeting concerning medical insurance and who said it? A. Well, after

Mr. Harris got done making the statements of a general nature, he said the Company had an answer to the Union's question of the previous November regarding the insurance for pensioners and that Mr. Rogers would give us the Company's position on this.

Mr. Rodgers started off by telling us that under the [21] agreement reached in 1964 on the extra two-dollar contribution, that the Company had a right to reclaim this two dollars in the event the Medicare program was effected or enacted. It had been enacted and the Company intended to reclaim that two dollars from each person that was receiving it, beginning July 1st, 1966.

He went on to tell us that with regard to working out an insurance program for the retirees, the Company intended to cancel out the insurance for all retirees.

He said because of the enactment of Medicare, the insurance would be practically of no value or practically useless or at least reduced to a point where it would be almost useless. He stated that our program of insurance for pensioners carried a front end deductible, I believe, and also the insurance of the pensioner would not apply where benefits were paid under another group plan and they considered the enactment of Medicare another insurance program under group planning and where Medicare paid, our insurance would not pay.

We, of course, objected to this. First of all, we objected to the taking away of the two dollars.

Mr. Curran: I object unless the witness says who said what at that time at that meeting. When he says, "He said," I don't know who he is talking about.

Trial Examiner: Very well, I'll sustain the objection.

[22] Q. (By Mr. DuRose) Who spoke for the Union and what did they say concerning this? A. I spoke for the Union.

I am the man that made the statement, I told him that we didn't exactly agree with the Company on the removal of the two-dollar contribution.

We agreed it was a matter of contract, that the Company had a perfect right contractually to take the two dollars

away, but it was just such a small item and covered such a few people that we thought it was a pretty small situation, but in any event we did agree that the Company had a right as a matter of contract.

I told him that our Union could not agree that he had the right to cancel the insurance for the pensioners. We felt, or I felt, speaking for the Union, that this was an agreed program that had been arrived at during the course of negotiations in 1964. We didn't feel that the Company had a right to make unilateral changes without bargaining with the Union on the situation.

We raised—I raised another question. I wanted to know what he was going to do with respect to people who were not 65 years old and who would not be eligible for Medicare benefits and, further, what was their intention with regard to the benefits of pensioners who were not qualified for or eligible for Medicare benefits.

[23] As I recall it, at that time the two people representing the Company took a short caucus, came back into the room, and stated they would have to work out a program to cover those people who were not eligible for Medicare benefits as well as the wives of the pensioners who were not eligible for the Medicare benefits.

Q. Who, do you recall who made that statement? A. Mr. Rodgers was doing the speaking for the Company.

Q. All right. A. We went on with the general discussion of the Company's position on the insurance, the pensioners' insurance situation.

Finally, I asked them if their main point was the fact that they intended to cancel out the pensioner insurance and during the course of this discussion, Mr. Rodgers stated that not only were they going to cancel out of the insurance but that it was their intent to contribute or give each pensioner a sum of three dollars and this three dollars would be applied toward the medical benefits under the Medicare program.

We went on with the discussion. I finally asked him if his main point was that it was the Company's intent to terminate the insurance for pensioners. He said that it was.

I told him we wouldn't agree with, this, we didn't think [24] it was right. We thought it was a bargainable issue, we thought we had a right to bargain on it. If he insisted on following or maintaining his position, we would have to take the courses open to us under our rights under the law.

Q. Did he make any reply to that? A. Nothing that I can recall. He may have said something, I don't know. I can't recall any particular remark.

Q. Was there anything else said about any other union in this meeting? A. Yes, during the course of the general discussion on the subject, I stated to the Company that it was certainly a funny thing to me that the Company at Barberton would not bargain for people who were already on pension whereas in the Glass Division of the same Company, they had just recently concluded bargaining for people who were already retired, and to this remark Mr. Rodgers told me that that's a different division under a different management.

Q. Was there anything else said at that meeting that you can recall? A. Yes. I believe Mr. Rodgers did tell our committee that the insurance for the pensions had always been optional and, further, told us that we had no right to bargain for people who were already retired, and I personally disagreed with him on this, this latter part of it. I didn't agree with the optional insurance thing, I didn't disagree——

[25] Q. Was there anything else said that you can recall? A. No.

Q. After that meeting, did you have any further discussions with the Company concerning medical insurance for retirees? A. Yes, on March the 23rd in the afternoon, I received a phone call from the Plant Manager, Mr. William Harris.

Q. And what was said? This was March, 1966? A. March 23rd, 1966.

Q. This was two days after the meeting? A. This was two days after the meeting on March 21st, 1966.

Q. What was said in this phone conversation? A. Well, Mr. Harris called. He started out by telling me that the Company had re-evaluated its position on the pensioners insurance question.

He said that rather than cancel out the insurance in its entirety, the Company was not going to disturb the insurance. They were going to leave it intact as it was.

He said, however, the Company was going to offer each group of pensioners an option to cancel their insurance and for those pensioners who chose to cancel their insurance, there would be a three-dollar contribution by the Company given to those pensioners to be used toward the premium cost of the medical benefits under Medicare.

Q. Did he say how he was going to communicate this with the [26] retired employees? A. Yes, he said it was the Company's intent to mail to each segment of pensioners—and this segment comes about because of the period of time they retired—he said they were going to mail a letter to each segment of the pensioners advising them of the Company's position. I believe he stated that there would be six different letters, either five or six different letters altogether.

He said the Company would be mailing those out to the pensioners. I believe he used the term "Within the next day or so." I asked him if it was his intent to send a copy of these communications to the Union. He said he hadn't thought about it, but if the Union wanted a copy, he would be happy to send the Union a copy and he did send us a copy.

Q. Okay. In the phone conversation, did you make any statements to Mr. Harris? A. When he had completed his statement as to the Company's re-evaluation and their intent at this time, I told him we still couldn't accept the Company's position on it but that our position basically was the same we had stated on Monday, March 21, 1966.

We felt that it was a bargainable issue and the Company should be bargaining with us on this question, and he advised me that we had the Company's position on that.

Q. You stated that you asked Mr. Harris to send you copies [27] of the letters and that he did so? A. Yes, he did so.

Q. When did you receive those letters? A. I believe we got those the following day on March 24th, 1966.

Mr. DuRose: Mark this G. C. 7.

(The document above-referred to was marked General Counsel's Exhibit No. 7 for identification.)

Q. (By Mr. DuRose) I hand you what has been marked for identification as General Counsel's Exhibit 7 and ask you if you can identify it, please. A. Yes, these are copies of the letters that Mr. Harris sent down to our Union office.

Q. Can you tell us what the letter on the first page is? A. Well, immediately behind the letter, he has a page which——

Q. No, could you tell us what the first page is? A. Well, the first page is a letter from John Rodgers to myself in which he explains the fact that he's sending down these communications——

Q. Okay.

Mr. DuRose: General Counsel moves that General Counsel's Exhibit No. 7 be introduced into the record.

Mr. Riemer: No objection.

Mr. Curran: No objection.

Trial Examiner: All right, it is received in the absence [28] of an objection.

(The document above-referred to heretofore marked General Counsel's Exhibit No. 7, was received in evidence.)

Trial Examiner: My notes on the documents don't show whether General Counsel's Exhibit 6 was received. I don't have any indication here and I'd like to know, please, has it been received?

I must not be on the ball. Has that been received, Mr. Reporter?

The Reporter: That has been received. I have a check mark here indicating that it's been received.

Trial Examiner: I'll mark it received.

Mr. DuRose: Can we go off the record?

Trial Examiner: All right. Let's take a short recess.

(Recess had.)

Trial Examiner: Back on the record.

I usually give the reporter a rest once in a while, they are the hardest working people in the building or, at least, in the room.

Are you ready to go forward?

Mr. DuRose: At this time the General Counsel offers the stipulation that the letters which were attached to the General Counsel's Exhibit No. 7 are identical to the letters that were sent by the Company to the pensioners.

[29] Mr. Curran: I will so stipulate, it being understood that there are different letters there. Each one is somewhat different and is being sent to a different pensioner, depending on what benefits they were entitled to at that time.

Trial Examiner: That's what the witness testified to, yes?

Mr. Curran: Yes.

Trial Examiner: That explains why they're different. I glanced at them——

Mr. Curran: With that understanding, I will so stipulate.

Trial Examiner: —it's obvious.

Mr. Riemer, will you join in the stipulation?

Mr. Riemer: Oh, yes.

Trial Examiner: Thank you. The stipulation will be accepted and become part of the record.

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[30] Mr. DuRose: Let the record show that on the duplicate exhibit of General Counsel's Exhibit No. 7, I have substituted copies of these letters which were supplied to me by Mr. Curran, rather than my own duplicated ones.

Trial Examiner: So it's complete now?

Mr. DuRose: It's complete.

[31] Trial Examiner: Very well.

Q. (By Mr. DuRose) After March 23rd, 1966, were there any further discussions between the Union and the Com-

pany concerning medical insurance for retirees? A. Well, yes, in October of 1966. Prior to October of 1966, we again had a series of meetings with the Company in Akron, Ohio over application of the contract, grievances, and matters of this type.

At the conclusion of these discussions, there was a conversation between both parties relative to whether or not the Union would be interested in looking at a proposal to extend the labor agreement. Myself, speaking for the Union, I told the Company we were always willing to look at a proposal of this type and were willing at that time to look at one.

On October the 11th, 1966, the Company gave us a proposal to extend the labor agreement, the current agreement, from October 20th, 1967 to October 19th, 1970. Among the things that the Company offered in its proposal was certain modifications to the Pension Agreement and among those modifications was a stipulation on the insurance for pensioners in which they re-established their previous position of a contribution of three dollars for those people dropping the insurance.

This proposal was not acceptable to the Union. The [32] Company reproposed this on October 20th in which they had offered certain additional benefits in addition to their offer of October 11th, but the proposal on pensioners insurance was exactly the same. We had no effective discussion.

There may have been a question or two, I'm not sure, but we had no effective discussion on this insurance question.

Mr. DuRose: Mark this No. 8.

(The document above-referred to was marked General Counsel's Exhibit No. 8 for identification.)

Q. (By Mr. DuRose) I'm handing you what has been marked for identification as General Counsel's Exhibit No. 8 and I'll ask you if you can identify that, please. A. This is a proposal submitted by the Company to the Union on October the 11th, 1966.

Q. All right. Can you tell us where the provision concerning the pensioners is located on this proposal? A. The general provision on pensioners is located on pages 1 and 2 and part of page 3; the part with reference to the pensioners insurance is located on page 4 of this proposal.

Mr. DuRose: General Counsel moves that General Counsel's Exhibit No. 8 be received into the record.

Trial Examiner: Hearing no objection——

Mr. Curran: No objection.

[33] Mr. Riemer: No objection.

Trial examiner: —I'll receive it.

(The document above-referred to heretofore marked General Counsel's Exhibit No. 8, was received in evidence.)

Q. (By Mr. DuRose) You stated that another proposal was received on October 20th? A. Yes.

Q. And that the provision concerning medical insurance for pensioners was the same? A. Yes.

Q. Since October 1966, has there been any discussions between the Company and the Union concerning the medical insurance for retired employees? A. Not to my knowledge.

Q. If there was some, you would have knowledge of it? A. I would assume so, yes.

Mr. DuRose: No further questions.

Trial Examiner: All right.

I believe you wanted his statement?

Mr. Curran: Yes.

Trial Examiner: All right. Do you have one?

Mr. DuRose: Yes, sir.

Trial Examiner: Give it to Mr. Curran.

Mr. Riemer: Am I permitted to ask a few questions before this statement——

[34] Trial Examiner: Yes.

Mr. Riemer: —is made?

Trial Examiner: Yes, go ahead.

I spoke too soon. I assumed that you weren't going to ask any questions by your silence, but I should have asked you.

Mr. Riemer: There are a few.

Cross Examination

Q. (By Mr. Riemer) Mr. Williams, early in your testimony in response to a question by Mr. DuRose, you said that in 1960 the Company had increased its insurance program for retirees by ten dollars to fourteen dollars. What do you mean by ten dollars to fourteen dollars? A. This was for daily room coverage charges at a hospital.

Q. When did the Company for the first time make any contribution to the premium of retired employees by agreement with the Union? A. 1962.

Q. That was during the negotiations? A. The contributions started at the conclusion of the negotiations, this is correct.

Q. In General Counsel's Exhibit 6, the 1964 agreement, starting on page 1 and continuing thereafter, there appears a lot of black lines. Will you tell us briefly what those lines represent? [35] A. Wherever you see in the copy of that contract a portion of the language underscored, this is indicative of a change that was made in the labor contract, in the contract that has been agreed——

Q. From the previous 1962 agreement? A. From the previous agreement, yes.

The underscoring doesn't indicate that every word in the previous language was changed, but there was a change in this particular paragraph or section.

Q. Oh, Mr. Williams, I want to direct your attention back to the meeting that you had or the conference that you had in the afternoon of March 21, 1966 with Mr. John Rodgers and Mr. William Harris. Perhaps I misunderstoood.

With respect to this question of whether the insurance for the retirees was optional or not optional, will you relate that conversation, please, just that portion of it? Do you recall it? A. The conversation at that meeting was a very brief conversation with regard to that point. Mr. Rodgers stated that the insurance for the pensioners had always been optional.

Q. Now, did the Union agree or disagree with that position? A. I don't think we questioned that position at all,

I don't think we either agreed or disagreed. He made the [36] statement, I don't think we had any comment on that particular remark.

Q. Then, what did Mr. Rodgers say on the question of bargaining about insurance for the retiree? A. Well, Mr. Rodgers took the position in that meeting that the Union had no right to bargain for people who were already retired on any matter and——

Q. And what was the Union's position with respect to that? A. We objected to that. It was our position that we did have a right to bargain for them and we had bargained for them in the past.

Mr. Riemer: That's all. Thank you.

Mr. Curran, That's all.

Mr. Curran: All right.

Mr. DuRose: Let the record show that I have given Mr. Curran a copy of the affidavit, that is in my possession, from Mr. Williams.

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Cross Examination

Q. (By Mr. Curran) Mr. Williams, I think you testified that at least since 1950, there has been a medical insurance [37] program for retired employees, is that correct? A. I believe that's what I said, yes.

Q. Now, I think you testified that that was collectively bargained, the program that was in effect in 1950, the medical insurance program? A. Yes, I think so.

Q. Was it ever reduced to a written agreement? A. No, sir.

Q. Actually, isn't it true, Mr. Williams, that it was not until 1960 that there was a signed agreement between the Company and Union providing for medical insurance for retired employees? A. I believe the first written agreement on it, Mr. Curran, came in 1962.

Q. I have had marked for identification Company's Exhibit 1 and I ask you if you have ever seen that document, what it is. A. Yes, I have.

Q. That is the agreement which is signed by the president of your Union and Mr. John Rodgers providing for the medical insurance for retired employees, is it not? A. Yes, it is.

Mr. Curran: I offer it in evidence as Company's Exhibit 1.

Trial Examiner: Any objections?

[38] Mr. Curran: Are there any objections?

Trial Examiner: I'm waiting for objections to its being received.

Mr. Riemer: No objection.

Trial Examiner: Will the Reporter show an absence of objections. Receive it into the record, Mr. Reporter.

(The document above-referred to was marked Company's Exhibit No. 1 for identification and was received in evidence.)

Trial Examiner: My notes don't show that General Counsel's Exhibit 8 is received. I want to know if my notes are correct. Once before, I was wrong.

Mr. DuRose: I thought I did.

Trial Examiner: All right.

Mr. DuRose: Well, I offer it at this time.

Mr. Riemer: It's the Company's proposal of October 11, 1966.

Trial Examiner: If you feel it's in, okay.

Mr. DuRose: I re-offered it at this time.

Trial Examiner: Just to make sure?

Do you know what G. C. 8 is?

Mr. Curran: Yes, the Company's proposal of October 11, 1966.

Mr. Riemer: No objection.

Trial Examiner: All right, gentlemen.

[39] Mr. Riemer: No objection.

Trial Examiner: I'll receive it, G. C. 8 is received.

Respondent's Exhibit 1 has been offered and received.

May I look at it so I can follow the testimony?

Go ahead, Mr. Curran.

Q. (By Mr. Curran) Mr. Williams, you testified in your direct examination that on November 23rd, 1965 the Union asked the Company to sit down with it and work out a program of benefits for those who were going to be covered by Medicare? Those retirees, is that correct? A. For those, yes, for those who would be covered by Medicare, this is right.

Q. And then you testified that what, you had no further conversations with anybody from the Company until you had one with David Redle around the 1st of March of 1966, is that correct? A. This is my recollection of it, yes.

Q. And that you didn't push the matter, in a sense, with Redle, but in a sense you were citing it as a matter of or example of some Company delay, is that correct? A. Yes.

Q. You testified you had no further communication with the Company in respect to this matter until you got a telephone call from John Rodgers on March 21, 1966, is that correct? [40] A. Yes, I received a call from John in the morning of March 21st.

Q. Do you recall giving an affidavit to the NLRB Field Examiner, John Harston, on April 29, 1966? A. Yes, I recall discussing it with Mr. Harston.

Q. Do you recall testifying or making this statement in that affidavit?

"The Union, as I recall, asked the Company to consider the alterations two or three times during the period that negotiations were held."

This is with reference to the meetings that were held in August 1965 to December 1965. Do you recall making that statement.

A. Mr. Harston asked me how many times——

Q. I just asked if you recall making that statement. A. Yes, I do.

Q. All right. Do you recall also making in that statement or in that affidavit the following statement?

"On March 10 or 11, John Rodgers from the Company called me and said that the Company would have a proposal by March 17 or 18."

A. No. No, I don't.

Q. I'll show you the affidavit and direct your attention to the top of page 2 and see if that now refreshes your recollection. [41] A. It's there, but I don't recall it. I recall the thing in a little different sense than it's stated there.

Q. Well, was there such a conversation with John Rodgers on or around March 11, 1966, with John Rodgers? A. I can't say there was. My memory and recollection doesn't serve me that there was, there could have been because we conversed frequently.

Q. Do you recall stating in that affidavit?

"On March 21, 1966, the Labor Relation Committee met with Rodgers and the Plant Manager, Harris. Harris told us that the Company had decided to cancel the Pensioners Insurance and substitute a three-dollar allowance toward Medicare payments. The Union said that it would not agree to this plan and at this point the meeting ended."

Do you recall making that statement?

A. Well, I recall saying that, yes. I said a lot more than that, but it doesn't appear here. I said that, that's right.

Q. Do you also recall the fact that in 1960, the Company challenged the Union's right to negotiate pensions and medical insurance programs for employees who were already retired? A. I recall the Company challenging the Union's right, yes. I can't specifically say it was in 1960, but I do recall it happening, yes, in fact.

The Company proposed that the Union withdraw from its [42] right to bargain for pensioners and we refused as a matter of contract.

Q. Now, Mr. Williams, at the time you had your meeting with the Company on March 21, 1966, between the time you first brought up this question of some sort of supplemental program to Medicare—you testified, on November 23, 1965, or between November 23, 1965 and March 21, 1966—did the Union ever present a proposal to the Company of the type of program which the Union would be willing to agree to? A. No, we didn't.

Q. Did you ever ask the Company for a meeting at which time you could present such a proposal to it? A. There was no occasion, we were still waiting on an answer to the question.

Q. I take it your answer is, "No, we did not"? A. No, we did not.

Trial Examiner: I take it that is not the General Counsel's position that the Company did refuse, so you don't have to go into it. That is not General Counsel's position and if it is, this is the time for him to say that. Here you give it a different slant because, as I understand it, the case is that they refused to meet with respect to their own actions, the Company's actions, is that correct, Mr. DuRose?

Mr. DuRose: That's correct.

Trial Examiner: All right, so that will eliminate a lot [43] of unnecessary cross examination.

Mr. Curran: I don't think there is an allegation in the Complaint of a refusal to meet. There is an allegation of refusal to bargain by taking certain unilateral action but not of a refusal to meet.

Trial Examiner: Well, but paragraph 9 is saying, "the Respondent without giving the Union an opportunity to bargain," and I suppose that means to meet, in any case. If that's the case, that still narrows the issue.

My point is that no one from the General Counsel or Mr. Riemer's office contends that there is any bad faith on the part of the Company in refusing to discuss with the Union any Union proposals. In fact, they don't claim there were any Union proposals, is that correct?

Mr. DuRose: That's correct.

Trial Examiner: All right. I'm trying to narrow the issues.

Mr. Curran: Yes, paragraph 9 of the Complaint says it was on or about March 24th, and there's no allegation that the Company did anything before March 24 to provide any basis for the Complaint.

Trial Examiner: Well, that's my whole point. You don't have to examine on that, they don't contend they offered something or that you refused to discuss it.

Q. (By Mr. Curran) Now, Mr. Williams, at this time in [44] March of 1966, there was in effect a binding agreement between the Company and the Union relating to the medical insurance for retired employees, was there not? A. Yes, we think so.

Q. And that agreement was to expire by its terms when? A. At the termination of the pension agreement.

Q. When was that? A. Well, the Pension Agreement was due to terminate June 28th, 1967, or the nearest termination date of the agreement, collective bargaining agreement, in effect at that time.

Q. Now, Mr. Williams, you're vice-president of Local Union No. 1? A. Yes, sir.

Q. Of the Allied Chemical and Alkali Workers? A. Yes, sir.

Q. You are elected to that office by secret ballot, are you not? A. Yes.

Q. Who is eligible to vote in the election of the union of which you're a representative? A. All members of our Union.

Q. All members? A. Yes.

Q. Are those people, who, say, normally have worked for the Company and then have left our employ, are they eligible [45] to vote in such an election? A. No.

Q. Is it just those people who are on the active payroll coupled with the layoffs and the employees on leave of absence? A. Those people who are the active payroll who are members of our Union are eligible to vote in the union election.

Q. How about a man on leave of absence? A. A man on leave of absence is eligible to vote.

Q. A man on granted leave of absence such as a union official on a leave of absence would be?

A man who would be on military leave of absence would be eligible to vote?

A. (No response.)

Q. If he was sick, if he was sick and was off, not working for that reason, or if the man had an industrial accident

or because of sickness—— A. A man off sick, personal sickness, or if he had an industrial sickness, he is eligible to vote, yes, sir.

Q. If the man quit the employ of the Company prior to the election, is he eligible to vote? A. No. No, he's not.

Q. A retired employee is not eligible to vote, is he? A. No, he's not eligible to participate in union elections.

Q. His title is—if he's retired from employment with the Company and in good standing with the Union—he becomes an [46] honorary life member, is that right? A. This is correct.

Q. If you have any contract ratification voted on by the employees at our plant, a retired pensioner cannot vote in such an election, can he? A. No, he cannot.

Q. We will call him a retiree or pensioner, you will understand what I mean? A. Mm-hmm.

Q. They're not carried on any seniority list, are they? A. As they use the term "seniority list" between the Company and the Union, no.

Q. Are there any terms or provisions of the collective bargaining agreement between the Company and the Union which is in evidence as General Counsel's Exhibit 6, do any of the terms and provisions——

Trial Examiner: We have several, do you mean to name them or generally cover them all?

Mr. Curran: I want to take the October 20, 1964 collective bargaining agreement in evidence as General Counsel's Exhibit 6.

Q. (By Mr. Curran) You're familiar with that document, are you not, Mr. Williams? A. Yes.

Q. You participated in the negotiation of it, did you not? [47] A. Yes, I did.

Q. And you are, in fact, one of the signatory parties? A. Yes.

Q. Do any of the terms and provisions of this contract apply to pensioners or retired employees? A. No, they do not.

Q. Now, you participated in the negotiation of all of the pension agreements that have been in effect between the Company and Union since 1950 to date, is that not correct? A. That's correct.

Q. Now, under that Pension Agreement, has it not always been true, Mr. Williams, that a man who is an employee within the meaning of the labor agreement is not entitled to pension benefits at the same time he is an employee? A. At the same time he's an active employee, that's right.

Q. Yes. In other words, a man who is covered by the collective bargaining agreement may not be a pensioner at the same time? A. I wouldn't exactly agree with that in its entirety, Mr. Curran.

Trial Examiner: Is this going to be the matter of interpreting those (indicating), he isn't going to do this? They're in evidence and I'll read them.

Mr. Curran: Well——

Trial Examiner: I think it's pretty general even though [48] I haven't seen those that if you're an employee and working, you don't get a pension. If that's the point you want to bring out, I think you have done it.

Mr. Curran: And it's contractually so.

Trial Examiner: I dare say this may be so unless these are different contracts from those.

Q. (By Mr. Curran) That is correct, Mr. Williams, if you're an employee and working, you can't collect a pension under this agreement (indicating) while you're an employee and working? A. While you're in the plant and actively at work, you can't collect a pension, that's right.

Q. Are there any pensioners or retired employees, are there any former pensioners or retired employees, that is, people who have gone off on a pension from the bargaining unit out there, have any of them been reemployed by the Company, to your knowledge? A. You mean in the hourly people?

Q. Yes. A. To my knowledge, no.

Q. Mr. Williams, the Pension Agreement currently in effect provides for an investing of pension for an employee

who has 15 years of service and has attained the age of 40? A. That's correct.

Q. If a man has 41 years of age and worked for 15 years and [49] leaves our employ maybe to go to California, when he's 65 he can apply for pension, can't he? A. Not exactly, he must have 15 years, pension years of credit. He may have worked 20 and have only 14 years of pension credit.

Q. This hypothetical employee, if he has 15 years at 65, he may apply and receive a pension, is that correct? A. Yes, sir.

Q. There are a substantial number of employees throughout Ohio, are there not, people who have left our employ after attaining 15 or more than 15 years of pension credit and who have attained the age of 40—— A. I don't know what you mean by "substantial number." There must be a half dozen or so.

Q. Do you represent those employes for the purpose of collective bargaining?

Mr. DuRose: Objection.

Trial Examiner: I'll sustain that objection.

Mr. Curran: Mr. Examiner——

Trial Examiner: The parties have agreed on what is a bargaining unit. You're not going beyond the agreement, you have agreed with General Counsel as to what the bargaining unit is and we're going to stick to that.

Mr. Curran: That's right, if the General Counsel agrees that the bargaining unit does not include retired employees.

[50] Trial Examiner: Well, I'll sustain the objection.

That's a question of law, gentlemen, as I see the pleading and as I follow the evidence. I haven't found yet as to whether retired employees may be the subject of collective bargaining. I may be wrong and I don't mean to prejudge the case, if that is a case question, or I wish you would research it. It's troubling me.

As of now, I don't mean to say I've made up my mind. I thought I knew a lot about law but I guess I don't.

Mr. Curran: This question is worthwhile——

Trial Examiner: I see your point, I know exactly what you're driving at.

Mr. Curran: —since the General Counsel in paragraph 5 of the Complaint stated what he thought was the bargaining unit——

Trial Examiner: Yes.

Mr. Curran: —to-wit, "The following employees at Respondent's Barberton, Ohio plant," and he cites the language, "All hourly rated employees employed at the Respondent's Barberton, Ohio plant . . ."

Thereafter, in the series of paragraphs in the Complaint, he mentioned the employees who were in the unit set forth in paragraph 5 but then added retired employees.

Trial Examiner: Right, that's a question of law as to whether this Union can bargain for them.

[51] Mr. Curran: First, the point I was trying to make is that the retired employees are not the unit set forth in paragraph 5 of the Complaint. They're not working; they are not at Respondent's Barberton, Ohio plant; they are not hourly rated employees of the Company.

Trial Examiner: It's obvious if someone leaves at this plant with 15 years retirement credit and goes to work for another employer, he's obviously not in the unit, but the question is whether or not the Union may bargain for their pension rights. I don't know the answer, that's this case as I see it.

Now, I'm not going to decide it now. It may be this case is more a question of law than it is a question of fact. I don't want to prejudge the case but I suspect that the facts are not too much in dispute.

Mr. Curran: No further questions.

Trial Examiner: All right.

Is there any redirect? I'm waiting to hear——

Mr. DuRose: Yes, sir.

Trial Examiner: Oh, I spoke out of turn again.

Redirect Examination

Q. (By Mr. DuRose) Mr. Williams, I ask you if you recall making a statement to Mr. Harston which appears in your affidavit to the effect that:

"The Union, as I recall, asked the Company to consider [52] the alterations two or three times during the period that the negotiations were held."

And, as I recall your testimony earlier, you testified that on November 23rd, you asked or the Union asked the Company to sit down and bargain concerning the effects of Medicare.

Would you explain that further for us, please?

A. Well, during this series of meetings in the late summer and early part of fall of 1965, we had, I believe, we had 20 some separate meetings with the Company involving salary issues and——

Mr. Curran: I'm going to object.

Trial Examiner: All right.

Mr. Curran: This is——

Trial Examiner: You're just asking him to repeat what he said, on redirect. I don't think it's proper redirect and I'll sustain the objection.

Mr. DuRose: There's been a question as to the credibility of the witness in that there seems to be a dispute as to what number of times this subject came up in the series of meetings——

Trial Examiner: Correct, he said one thing, I assume, in direct and another on cross. It's necessary for me to assess that but you don't come back and go over it again.

Mr. DuRose: I don't intend to go over the entire discussions, I think it's fair to explain what the discrepancy [53] may be to see if there's a reason for it.

Mr. Curran: I'm going to object. The witness on cross said he had no recollection of this, I believe.

Mr. DuRose: That's not correct. He started to explain it, and you asked him to answer yes or no.

Trial Examiner: I did?

Mr. DuRose: No, the witness started to explain the discrepancy and Mr. Curran directed him to answer yes or no, which he did.

Trial Examiner: Well, I will adhere to this ruling, this is not a proper redirect. You may, by a proper question,

bring out what you want to, but I don't think the question is properly framed. What you're asking him to do is to repeat all over again what happened during this period, and you brought that all out on direct.

Go ahead.

Q. (By Mr. DuRose) Well, let me ask you, Mr. Williams. During your series of meetings in 1965, late 1965, how many times that you can recall did the subject of medical insurance come up?

A. I can give the same answer I gave Mr. Harris on that. I know we asked the question on November 23rd, 1965. It may have been asked on one or two other occasions, I'm not positive. I'm not positive, I can't say it was, I can't say it was not.

[54] Mr. DuRose: No further questions.

Mr. Riemer: May I be permitted——

Trial Examiner: Of course.

Recross Examination

Q. (By Mr. Riemer) Mr. Williams, doesn't the Pension Agreement between the Union and Company have any provision for any early retirement in the event of disability? A. Yes, it does.

Q. Within your knowledge, has any man been recalled to work, any hourly rated employee been recalled to work by the Company upon recovery from disability? A. Not to my knowledge.

Q. How many retirees in the sense of men eligible for pension, formerly active employees who are no longer working with the Company are there, approximately how many? A. You mean people currently retired?

Q. Yes, sir, at the Barberton plant. A. I can't give the exact figure, but it's approximately 200, give or take the number that's deceased in the last year.

Q. All right. You knew that the letters attached to General Counsel's Exhibit 7 were sent to the retirees, did you not, Mr. Williams? A. Mr. Harris had advised me they were going to send them, and since that time as people who

are currently retired or were retired at that time came around the Union Hall, they [55] showed me the letters, several of these.

Q. Do you know, did you ever ask the Company to give you any information concerning the response that was made by the retirees to those letters? A. Yes, we did.

Q. And what was the answer of the Company? A. Well, this occurred——

Q. And can you tell us, please, who gave the answer and approximately when the demand and response was made and given? A. I can't give the exact date, but during our series of meetings through August and September and early October in 1966, on one occasion, we asked the Company how many people had actually cancelled their insurance and taken the three dollars in lieu of insurance, and Mr. Harris answered and he said he thought the number that had actually cancelled was 15 or in the neighborhood of 15. He wasn't exactly certain.

He said the Company could check that figure and let us know. I told him we would appreciate it if he would. He hasn't.

Mr. Riemer: Thank you. That's all.

Mr. Curran: May I ask a question?

Trial Examiner: All right.

[56] Q. (By Mr. Curran) Mr. Williams, after March 23, 1966, did the Union ever request a meeting with the Company for the purpose of negotiating an agreement covering medical insurance for retired employees? A. Not to my knowledge, Mr. Curran.

* * * * * * * * * *

[61] Mr. Curran: Mr. Examiner, I would like the Reporter to mark three exhibits. The first one is Company's Exhibit 1.

Trial Examiner: You have already gotten one marked.

Mr. Curran: Pardon me, as Company's Exhibit 2.

Decision and Direction of Election in Board's Case No. 8-RC-270, in the matter of the Pittsburgh Plate Glass Com-

pany, Columbia Chemical Division, and Allied Chemical and Alkali Workers of America, Local No. 1.

(The document above-referred to was marked Company's Exhibit No. 2 for identification.)

Mr. Curran: Company's Exhibit 3 is Notice of Election, United States of America, National Labor Relations Board, which Notice of Election was an election which would have authorized the Charging Party here to enter into an agreement which required membership in the Union as a condition of employment.

(The document above-referred to was marked Company's Exhibit No. 3 for identification.)

Mr. Curran: And Company's Exhibit 4, a Supplemental Notice of Election for the U.A. election.

(The document above-referred to was marked Company's Exhibit No. 4 for identification.)

[62] Mr. Curran: I offer Company's Exhibit 2, 3, and 4.

Mr. DuRose: General Counsel has no objection.

Trial Examiner: Mr. Riemer?

Mr. Riemer: I have no objection to Company's Exhibit 2.

Trial Examiner: All right.

Mr. Riemer: I object to Company's Exhibit 4.

Trial Examiner: There being no objection to Company's 2, mark 2 received, Mr. Reporter.

(The document above-referred to heretofore marked Company's Exhibit No. 2, was received in evidence.)

Trial Examiner: How about 3, gentlemen?

Mr. Riemer: All right, I object to 3 and 4, your Honor.

Trial Examiner: All right. Let me see them, please, I have to pass on them.

Is this No. 2 a Decision and Direction of Election with respect to this particular unit?

Mr. Curran: Yes, sir.

Trial Examiner: I just wanted to know. At the time you

had them identified, I had no way of knowing. I just want to see them so that I can better understand this.

Exhibit No. 2 is in. I'll take each one up separately. As to 3, what do you offer 3 for, so I can pass on the objection, Mr. Curran?

Mr. Curran: I offer 3 for the particular language of [63] those who are eligible to vote in the election, the union authorization election of February 16, 1949; and since Company's Exhibit 4 was a supplemental to it, in order to keep the record complete with respect to the direction of the election, I offer that.

However, I offer 3 in particular for the fact that the Board indicated who was eligible to vote and that the employee had to be working and at an hourly rate of pay at the plant.

Trial Examiner: But that isn't the issue before me. The question isn't whether or not they're eligible as to the vote, it's whether the Union may bargain for them.

Mr. Curran: I recognize that, sir.

Trial Examiner: I don't see the relevance of this.

Mr. Curran: If we can establish first, as I think, that it's the status of these employees that the Board thought they had so little connection or interest in the bargaining unit that it wouldn't even permit them to vote in the election——

Trial Examiner: Well, the evidence in before me is that there were no retirees for the union bargaining—assuming it could bargain prior to this time. The allegation, this is in the Complaint, plus Mr. Williams' testimony, which is that they didn't start bargaining, using this in the loose sense, not in a conclusionary sense, his testimony [64] is that they didn't start discussing the retirees until 1949 and '50, and therefore, I think, assuming it's relevant, it is not helpful to that issue because it goes prior to the time that Mr. Williams mentioned in his testimony and prior to the time mentioned in the Complaint.

I think the Complaint alleges that the bargaining relationship started January 1st, 1949. All right.

Mr. Curran: The bargaining relationship began, Mr. Examiner, you might say as a result of these three offered exhibits.

The first one is the one directing an election. The Union then was certified for that and then they petitioned for a U.A. election and they won that election. They were now not only certified but they were certified to bargain for a union shop.

Trial Examiner: That's what you say, I have to go by the record. The record so far is only what Mr. Williams testified to.

All right, I just want to make an explanation of why I'm excluding them so that the Board may have the benefit of my thinking.

Mr. Curran: You're excluding the exhibits?

Trial Examiner: Not 2, 2 is in. The parties have not objected to it but I don't see the relevancy of 3 and 4 and Mr. Riemer's objection is sustained.

Mr. Curran: I would further like to say——

[65] Trial Examiner: All right, I'll withhold ruling.

Mr. Curran: —since they are in a sense public documents, that I think they should be received in the record so that reference can be made for any reviewing authority because it is particularly difficult for anyone to obtain these documents now since they are some 18 years old, at least.

Trial Examiner: Well, they will be in the rejected exhibit file. They will be there so that the Board can look at them.

Mr. Curran: But may the Board consider them?

Trial Examiner: Well, if the Board reverses me, yes. I'm not infallible. I guess you gentlemen have read the Board's decision where they have reversed me.

I see your point, but I don't agree with you, Mr. Curran. I don't see its relevancy and I'll take judicial notice of the Board's rule that only eligible persons may vote in either a R. C. election or a unit election. I'll take official notice of that document. In my opinion, it is not admissible, but it will be in the rejected exhibit file.

Put these in the rejected file, Mr. Reporter, Exhibits 3 and 4 of Respondent.

(The documents above-referred to heretofore marked Company's Exhibits Nos. 3 and 4, were rejected.)

Trial Examiner: All right, come forward. Would you raise your right hand?

[66]

John M. Rodgers

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

Trial Examiner: Please be seated and give your name and address to the Reporter.

The Witness: I'm John M. Rodgers, Director of Industrial Relations of the Barberton plant of the Pittsburgh Plate Glass Company.

Trial Examiner: What is your home address?

The Witness: 606 Castle Avenue, it's Barberton Ohio.

Direct Examination

Q. (By Mr. Curran) What is your position with the Company? A. Director of Industrial Relations of the Barberton plant.

Q. How long have you held that position? A. Since 1954.

Q. How long have you been employed at the Barberton plant of the Company? A. Since June, 1952.

Q. Mr. Rodgers, under whose supervision and direction and custody are the Company's records with respect to labor relations and bargaining matters kept? A. The Industrial Relations Department.

Q. Are they under your general supervision? A. Yes, sir.

[67] Q. Mr. Rodgers, when was the first time the Company ever engaged in collective bargaining with the Union here with respect to the medical insurance for retired employees? A. In 1960, in January.

Q. Prior to 1960, did the Company have any medical insurance program in effect for retired employees? A. Yes, it did.

Q. Do you know how long we had such a program in effect? A. The program was in effect sometime prior to 1949, about 1949.

Q. Did that program require any contribution from the Company? A. No, sir, it did not.

Q. The employees paid the entire cost of the program? A. Yes, sir.

Q. Now, how many programs were there in effect? Was there just this one that was in 1949? A. Yes.

Q. How long did that program continue? A. That program continued until 1954.

Q. What happened in 1954? A. There was a general consolidation of the program in effect and we had a plan that provided a nine and ten dollars a plan and then it was determined that the pensioners would receive as a group the benefits of a ten dollar a day plan [68] thereafter.

Q. Was there any bargaining with the Union with respect to that change in 1954? A. No, sir.

Q. Was that change ever incorporated into any form of an agreement with the Union? A. No, sir.

Q. Now, after 1954, did the Company continue to offer medical insurance for retirees? A. It did.

Q. When was the first time that the Company bargained with the Union over this——

A. As Mr. Williams stated, it commenced on the basis of early discussions for extension, approximately in November 1959, the latter part of October 1959, and extending over, extending over to about in 1960.

Q. What was the result of those negotiations? A. The result was the arrival at an agreement, a signed agreement, which extended to future pensioners, those retiring subsequent to that agreement, a program of medical and insurance benefits which provided a fourteen-dollar a day, 70-day plan, fourteen dollars daily benefits for 70 days in the hospital, 20 times the daily benefits for extras, and it provided a two-hundred dollar surgical schedule and five dollars for in-hospital medical visits.

[69] Q. What you say, you've said a ten dollars, you identified a ten dollar a day plan and a fourteen dollar a day plan. What you mean by that? A. Those differences are that those people who are retired prior to the execution of the 1960 agreement had a program of insurance that provided only a ten dollars a day, daily room and board for 70 days, and it did not have a surgical or medical benefit feature in it.

The 1960 agreement, commonly termed the fourteen-dollar a day plan, had the other benefits that were previously enumerated.

Q. After 1960, did you again bargain with the Union with respect to a medical insurance plan for retired employees? A. We did again bargain and negotiate in 1962 relative to the future retirees on the program, yes.

Q. And the effect of that was to do what? A. The Company entered into an agreement to provide a two dollar per month contribution towards the cost of the fourteen-dollar a day plan for the pensioner who retired after June 28, 1962 on the condition that it would be applicable only if they carried the plan that was offered to them.

Q. I show you this document and ask you if you can identify it, please. A. This is not the right one.

Q. Pardon me?

[70] Trial Examiner: That would be Respondent's 5?

The Witness: 1962, this is it, yeah.

This is the Memorandum Agreement signed by the representative of the Company, myself as representative of the Company, and by Donald Walker who was then President of the Union, dated the 29th of July, and it provides that the Company would agree to provide a reduced Hospitalization and Surgical plan for employees retiring after June 27th, 1962, in which the employee paid the full amount of the premium.

Q. (By Mr. Curran) Now, this was an agreement of 1962—— A. Yes.

Q. —with respect to the medical insurance for employees who retired after June 27, 1962?

Mr. Curran: I offer this in evidence and ask to have it marked as Company's Exhibit 5.

Trial Examiner: It's Respondent's Exhibit 5.

Mr. Curran: We have been talking about them as Company's exhibits.

Trial Examiner: I don't care what you call it as long as we know it isn't General Counsel's.

Mr. Curran: All right.

(The document above-referred to was marked Company's Exhibit No. 5 for identification.)

Mr. Curran: Is there any objection?

[71] Trial Examiner: They haven't heard you offer it.

Mr. Curran: I'm sorry. I offered Company's Exhibit 5.

Mr. DuRose: Before taking a position, could I ask a question on voir dire of the witness?

Trial Examiner: Voir dire is limited to authenticity of the document. What you really want to do is have advanced cross examination. It's all right with me if it's all right with Mr. Curran.

Mr. DuRose: I have no objection.

Trial Examiner: I'll receive what is marked as Respondent's Exhibit 5.

Mr. Riemer: I have no objection.

Trial Examiner: 5 is received, Mr. Reporter.

(The document above-referred to heretofore marked Company's Exhibit No. 5, was received in evidence.)

Q. (By Mr. Curran) Now, in 1964, you had negotiations again with the Union, did you not, with respect to the medical insurance for retired employees? A. Yes, we did.

Q. You entered into an agreement with them? A. Yes, we did.

Q. And I believe that's in evidence now as General Counsel's Exhibit 5.

Now, Mr. Rodgers, do you recall attending a meeting in November, 1965, which was a matter of the supplemental program for Medicare, where that topic came up? [72] A. Yes. I did.

Q. Do you recall when the meeting took place and who was present? A. November 23rd, it took place at the Holiday Inn in Akron, and present for the Union was the Union Committee as had been stated here, Mr. Williams, Mr. Blouir, Mr. Lowry, Mr. Campbell, and Mr. Rudd.

Representatives of the Company were Mr. Harris, Mr. Koblentzer, and myself, and Mr. Rimlinger, and Mr. Jones.

Q. Was the meeting called for that purpose or for some other purpose? A. No, the meeting was called for other purposes but——

Q. But this subject did come up.

Do you recall what was said and who said it?

A. The subject came up towards the last part of the meeting. It was raised by Mr. Williams and at that time he made an inquiry of the Company about what the Company's plans were in connection with the four-dollar contribution the Company was making and whether we had an intent to reduce it in the event of Medicare and he asked how we felt the factors of Medicare and those benefits would tie in with our program insurance.

We responded that——

Q. Who responded for the Company? A. I responded that this was a matter that with the advent [73] of Medicare was confusing. It was not clearly understood by very many people at this time but it was a matter we would like to look into and take the subject under advisement.

Q. Is that all you recall that you said about that subject? A. Yes, sir, that is all I recall.

Q. After that meeting was over, do you know, what, if anything, was done with respect to investigating this matter? A. Yes, we reviewed the matter, reviewed the matter locally with our people.

Q. That is, with a management of the Barberton plant? A. The management of the Barberton plant, and the matter was also referred for discussion to our Industrial Relations Department, our Pittsburgh office, and our insurance carrier, the Equitable Life Insurance Society, and we made our observations to the intent of determining what the local

insurance carriers, the private insurance carriers, in effect, Equitable Life Insurance, may be doing to provide some supplemental form of insurance.

Q. As a result of this inquiry and discussion that you had, did you come out with any program? A. No, Equitable had not come up with any during this period.

Q. Do you know if any other insurance carriers had come up with a program to supplement Medicare? A. Well, we were——

[74] Mr. Riemer: Objection.

Trial Examiner: I wonder whether this is hearsay unless there is present a representative of the Union.

Mr. Riemer: Your Honor, the question pending was—would you read it, please, Mr. Reporter?

Trial Examiner: Yes, read it, Mr. Reporter. Perhaps I misunderstood your reason.

(Question read.)

Mr. Riemer: It's other insurance carriers. I did not object to the previous question which was related to the Equitable Life Insurance carrier.

Trial Examiner: All right. The fact that they had discussions, in my opinion, is admissible, the nature of the discussions even with their own carrier in the absence of a representative of the Union is inadmissible, as hearsay.

As to the fact that you didn't object to it, I'm still ruling it's hearsay, so I'll sustain this objection.

Mr. Curran: I think this is relevant, Mr. Examiner. Part of the Union's or General Counsel's case here is an allegation of the unilateral action taken on March 24, 1966.

Now, I think this evidence is relevant to indicate why, whether that was unilateral action or not, why it was done on March 24, 1966. It's our position——

Trial Examiner: If it's a bargaining right and if it's unilateral, then there is no defense. I'm not saying that [75] it's bargainable or that it's unilateral. The Board has held that you are under an obligation to bargain with the Union on bargainable matters unless they have waived that

right. The reason you did, according to the Board's decision, is immaterial and I'm going to sustain the objection.

Mr. Curran: The Board has ruled, Mr. Examiner, that the employer may act with the idea that he may bargain later if circumstances require him to bargain at that.

Trial Examiner: There is an impasse or an agreement expressed or implied over what goes on between him and a third party and with the Union not present, it is not admissible. I'm adhering to my original ruling.

I will not prevent you from showing that there were certain actions between him and the Union or that an impasse resulted in no action until later on or that there was reason if it was unilateral. There are Board's decisions to that effect. I want the record to be clear that I'm not preventing you from developing that point.

Mr. Curran: I'm not sure I understand your point.

Trial Examiner: You said you wanted to show there was reason he took unilateral action——

Mr. Curran: No, why he took the action of March 24. If you determine it to be unilateral——

Trial Examiner: I didn't determine it to be unilateral, I say if it was unilateral——

[76] Mr. Curran: It can still be excused.

Trial Examiner: Make an offer of proof. It may be that I'll change my mind. I still don't see its relevancy.

Mr. Curran: I would offer to prove through this witness that in toto the subject of a supplemental program for Medicare was a matter which was under intensive discussion throughout the insurance industry and between our Company and our carrier, that it was a problem for consideration for other carriers in the industry; that throughout this period, no carrier had come up with a plan; that the first we knew of another plan that would in any way be available was approximately March 15, 1966, just 16 days before a person who wished to sign up for Medicare had to sign up; and that thus the time at which we could go to the Union that we finally got the first fruits of this sort

of program and the time we could actually come back to the Union here saying, "Here is something you can consider," was March 15, 1966; and——

Trial Examiner: And this was called to the attention of the Union? That's what I have been trying to find out from you before I ruled on the objection.

If it was, I will allow it; if not, it may remain in as an offer of proof.

Mr. Curran: Well——

Trial Examiner: Don't argue with me, I'm just explaining [77] my ruling.

Was it called to the attention of the Union?

Mr. Curran: I think the testimony of both Mr. Williams and Mr. Rodgers already was that the Company said on November 23rd that they would have to take this matter under consideration thereafter. I think Mr. Williams, I think he admitted at least in his affidavit that he had another conversation with Mr. Rodgers March 10th and 11th.

Trial Examiner: Those are all admissible, I haven't stopped you there.

Mr. Curran: Yes. Yes, and that part of the conversation on March 10th or 11th related to the Company's program—related to the Company's problem of getting a program.

Trial Examiner: All right. I will allow you to bring that out with the witness but your offer of proof, I still reject. I don't think it's admissible.

Q. (By Mr. Curran) Mr. Rodgers, after November 23, 1966 and prior to March 21, 1966, did you have occasion to have any conversation with any representative of the Union concerning these medical insurance programs? A. Yes. Yes, as was stated, approximately March 10th in——

Trial Examiner: March what?

The Witness: March 10th.

Trial Examiner: I didn't hear you. Thank you.

A. (continuing) I had a conversation with Bill Williams in [78] connection with other matters that he was discussing and, of course, in that discussion he inquired whether

we had heard anything or had an answer relative to the question he raised on the medical insurance program.

I indicated that we were still studying it and taking a look at it and we expected we might have something at an early date. I believe I expressed it as within a week to ten days.

Q. All right. Now, after that discussion with Mr. Williams on March, approximately March 10, 1966, did you have occasion to have any further discussions with any representative of the Union? A. We did have a meeting with the Union Committee on March 21st, 1966.

Q. That meeting was held where? A. It was held at the Barberton plant and Mr. Harris's conference room located in the main office.

Q. Do you know who arranged for that meeting? A. Yes, I called Bill Williams and suggested getting together about 3:00 o'clock——

Q. And present for the Union was—— A. Present was the same committee previously named.

Q. And for the Company? A. Mr. Harris and myself.

Q. And now, will you tell us what was said at this meeting [79] and who said it, just as well as you can recall? A. Well, as was stated by Mr. Williams in the offset and I won't go into the details, but the meeting was opened with general discussion on the part of Mr. Harris covering a number of points that he felt would be of interest to the Union as information matters.

Then, Mr. Harris introduced the subject of the past pensioners medical insurance program, and he indicated to the Union that they had raised a question relative to the employer contribution that is being reduced in July, July 1, exactly. He stated that this was a contractual provision and that the Company intended to make that reduction at that time.

He then indicated that we'd been studying the possible effects of Medicare upon our past pensioners program of insurance, that I would review our thinking on the subject.

So then, I proceeded to review the matter by indicating a confirmation of the fact that they had raised this question and that we had been studying the effect of Medicare on our program of insurance. I pointed out that—again affirming that the matter of four dollars that was in effect as a contribution was subject to being reduced at July 1st to two dollars and it was our intent to make that reduction.

I next pursued the area of the past pensioners program of insurance by reminding the Union that the Memorandum [80] Agreement provided that this program of insurance was optional with the employee when he retired and that he could elect then to take this program of insurance by entirely paying the full premium of the cost of the insurance less those agreed-to reductions.

We mentioned four dollars which was in effect for certain of the past retirees and pointed out that the program could be as well dropped by him by virtue of not paying the premium.

Then, I covered the fact, as I recall it, that with the advent of Medicare that the program of insurance that the employee was carrying with the type of benefits now available in the Medicare would not be worth much to him. We thought that the pensioner had to take a look at the cost situation and the relative cost to him now would be particularly high in view of the fact that most of the benefits could or would be covered by Medicare.

I further indicated with respect to the non-duplication of the benefit provision that what this would do is contribute to what we consider a program that has lost most of its value. I then indicated that we had been studying the matter and then we'd come to a conclusion which we wanted to give our thinking on.

I next indicated that it was our plan to write to our pensioners and advised them of the effect of Medicare and to [81] indicate to them that we were planning to cancel our insurance program covering the Medicare or covering the medical phase. I intended then to include in such a letter, to tell the Union, a reminder to them of their need

to sign up for the Medicare phase of the Government program.

I further indicated that we would be willing to furnish to anyone of the past pensioners who discontinued his program of insurance an amount of three dollars per month towards the cost of his Medicare. I pointed out that this would have the effect of covering a number of employees who had no form of insurance with the Company and this would mean that they would be getting an amount of three dollars from the Company.

I pointed out, as I implied, to those who would have a benefit of a two-dollar contribution effective July 1st, that this would result in their obtaining an additional one dollar. I pointed out further that there were other groups too, groups who would be receiving no contribution from the Company who would benefit by an amount of three dollars, should they drop the program of insurance.

Thus, I pointed out we had the problem, as we saw it, with certain employees who were then retired but who were under age 65 and we then stated that we would be willing to provide that they could continue in the program of insurance they then carried until they became age 65, and that we would make [82] a three dollar contribution towards the cost of that program until they became age 65 and then that they, if they dropped the program, we would continue the three dollars in effect.

I felt that the question of a spouse had to be covered and we then covered that, the fact that we would be willing to provide that the spouse of an employee who was over 65 would be permitted to continue in the program of insurance, whichever one applied, by timely paying the premium cost for single coverage.

Q. There would be a spouse under 65? A. A spouse of under 65 to a retiree who was over 65.

Q. All right. A. The next question was the matter of the supplemental agreement that provided for the pensioners taking this program of insurance under the two-dollar arrangement.

We stated that we would be willing to amend that supplemental agreement to provide for future pensioners so that they would have one program of insurance available to them, that would be Medicare, and that we would be willing to provide the three-dollar contribution to them.

In that connection also, we made the offer to provide for a spouse who would be under 65 so that she could get or carry a fourteen-dollar a day coverage by timely paying for the premium for a single coverage.

This was the extent of my presentation. Mr. Williams [83] promptly indicated that the Union was not at all receptive to what the Company was planning to do. He pointed out that in his opinion he felt that we did have a legal right to do what we said we were going to do and then inquired of Mr. Harris of whether or not we would be willing to provide in some form a supplemental form of insurance.

Q. Did Mr. Williams indicate or say what kind of supplemental program? A. No, there was no definition or details concerning what he had in mind, other than a statement, would the Company be willing to furnish a supplemental program of insurance, and Mr. Harris responded that he felt this was a matter that was covered by the contract. Nevertheless, the Company was not willing to extend its approach to cover a supplemental program of insurance.

Mr. Williams then indicated that he would expect to take counsel with his attorney on the matter and asked us if we would, in effect, reduce our suggestions in writing, the proposals that we made during these discussions, and Mr. Harris indicated that he would consider outlining them in writing and asked Mr. Williams to give him the courtesy of a call after Mr. Williams had an opportunity of talking to his attorney, and this essentially was it.

Q. Mr. Rodgers, is a seniority list maintained for employees at the Barberton plant? [84] A. Yes, it is.

Q. What persons would be listed on that seniority list? A. Employees who are members of the bargaining unit or

actively at work, employees who are active employees who are on a leave of absence or employees who are considered off duty due to general illness or industrial injury.

They still have seniority rights and would be continued on the list.

Trial Examiner: Do you have to go into all of this? You're trying to show that retirees are not on the list, is that it? Why don't you ask him directly? I'm not interested in all this.

Mr. Curran: All right.

Trial Examiner: Is that your point, what you wanted to establish?

Mr. Curran: Yes.

Q. (By Mr. Curran) Are retirees maintained on the seniority list? A. No.

Q. On any supplemental thereto? A. No, sir.

Q. Do you know if retirees have any rights under the collective bargaining agreement between the Company and the Union? A. No, sir.

[85] Q. In the approximately thirteen years or so that you have been at this plant, have retirees had any rights under the collective bargaining agreements—— A. No, sir.

Q. —in effect between the Company and the Union? A. No, sir.

Trial Examiner: I didn't mean to butt in, you were doing it the right way. I know you're not supposed to be asking leading questions, but I didn't think it was harmful in this case. I knew what you were driving at, and it was the easiest way to get to the point instead of asking all these exclusions.

Q. (By Mr. Curran) When an employee quits his employment with the Company, is he maintained on the seniority list? A. No, sir.

Q. If he's discharged, is he maintained on the seniority list? A. No, sir.

Mr. Curran: Is this No. 4?

Mr. DuRose: Yes.

Mr. Curran: 4?

Mr. DuRose: No, it's 6.

Mr. Curran: 6?

Mr. DuRose: That's the contract.

Mr. Curran: The Pension Agreement?

[86] Mr. DuRose: That's 4, yes.

Mr. Curran: That's 4?

Mr. Riemer: Yes, General Counsel's 4.

Q. (By Mr. Curran) Mr. Rodgers, is a man who is an employee and has rights under the collective bargaining agreement, is such a person eligible to receive a pension? A. No, sir.

Mr. Riemer: May I have the question read, your Honor?

Trial Examiner: Read it back, Mr. Reporter.

(Question read.)

Q. (By Mr. Curran) Do you want to explain? A. Employees in the bargaining unit have to meet certain eligibility requirements. After having met certain eligibility requirements, they would become eligible under the Pension Agreement for a pension.

Q. But may such a person while he is still an employee receive a pension? A. No, sir.

Q. Is that provided for in this agreement? A. Yes, sir.

Q. Where? A. It's provided for in the Pension Agreement.

Q. I hand you the Pension Agreement, General Counsel's Exhibit 4, and ask if you can indicate the relevant provisions? A. Yes, sir.

[87] It's provided in Subsections (b) and (c) which define an employee at the Barberton plant and also under Section (c) where it defines a pensioner, which means a person who is retired under the terms of this Pension Agreement and who receives or is entitled to receive pension benefits.

Q. Mr. Rodgers, may a person who retires from employment with the Company from this collective bargaining unit at age 65, may he again work for the Company in a

position covered by that collective bargaining unit? A. No, sir, he may not.

Q. Is it provided for in any agreement? A. Our Pension Agreement.

Q. Under what provision? A. On page 2, there's a provision, the top of page 3 makes reference to it.

Q. What section of the agreement? A. This is Section 2 of part 1 of the Pension Agreement.

It starts at the bottom of page 2 and carries over to the top of page 3 and this provision provides for compulsory retirement for a pension for eligible employees who have attained their 65th anniversary of birth.

Q. Is there any language in there with respect to the retirement being mandatory? A. It states—yes, sir, it states: "On and after June 28, 1964 retirement upon a pension of an eligible employee who has [88] attained the 65th anniversary of his birth shall be mandatory."

Q. Under certain circumstances an employee may retire prior to age 65, is that not eorrect? A. That is correct.

Q. You do have an early retirement provision? A. We do.

Q. What is the provision in essence with respect to age and length of service? A. When an employee has attained his 60th birthday and having had 15 years of service, he can make application and retire on reduced pension.

Q. When an employee retires pursuant to that provision on a reduced pension, does the employee have the option to request and must he be granted the return to work in the bargaining unit if he so desires? A. He has no right to return to the bargaining unit, the Company would have option, sole option concerning his return.

Q. He cannot say simply, "I waive my pension, I want to go back to work? A. No, he cannot go, no.

Q. With respect to the disabled employees, do you have a Pension Agreement feature? A. Yes, we do have.

Q. You have disabled pensioners younger than 65? A. Yes, sir.

[89] Q. If a former employee goes on disability pension and recovers from a disability, does he have a contractual

right to demand re-employment in the bargaining unit? A. He does not.

Q. He may request it as any other potential employee? A. He may request it, but it's the sole option of the Company.

Q. Has the Company ever re-employed, to your knowledge, a person who is receiving a normal retiring pension? A. No, we have not.

Q. Has the Company ever re-employed a man—and in each case I mean in the bargaining unit—a man who retired from the bargaining unit on an early retirement pension? A. We have not.

Q. Has the Company ever re-employed in the bargaining unit a man who retired from the bargaining unit on a disability pension? A. No, sir, we have not.

Q. Mr. Rodgers, I note in General Counsel's Exhibit 4 that there are provisions there, in the Pension Agreement, for employees who are covered by the collective bargaining unit to accumulate continuous service. You're familiar with those provisions? A. Yes, sir.

Q. And in general, they provide that the employee would [90] accumulate credit of continuous service by working in the bargaining unit, is that correct? A. Yes, sir.

Q. And when an employee retires, does he accumulate his continuous service pursuant to the terms of the agreement, the Pension Agreement? A. No, he does not.

Q. In fact, directing your attention to Page 19 of General Counsel's Exhibit 4, part 1, Section 2—Section 3, rather, Paragraph (2), which starts: "Continuous service——"

Mr. Riemer: What page?

Mr. Curran: Page 19. At the bottom, the last two lines at the bottom, "Continuous service shall be broken . . ."

Reading to the end of that sentence, Mr. Rodgers, when an employee retires, I believe you testified that his continuous service is broken—— A. That is correct.

Q. When an employee retires under or pursuant to the agreement, does he cease to be an employee, under the labor agreement? A. Yes, he does.

Q. Then, he becomes what, under the Pension Agreement? A. A retired employee as defined in the Pension Agreement.

Q. Or a pensioner? A. A pensioner, that's another term. [91] Q. Mr. Rodgers, does the Company maintain the addresses of the pensioners? A. Yes, it does.

Q. I wonder, Mr. Rodgers, where do the people who have retired on pension pursuant to the various agreements from 1950 to present, do you know where they reside? A. Well, they reside all over Ohio and there's a number that still reside in Barberton, I guess some six to eight states, as well as some in Yugoslavia today.

I guess they're all over the place.

Q. Mr. Rodgers, as a result of the plan which went into effect—well, which was announced by letter to the employees on March 23, 1966—— A. March 24th.

Q. —24th, 1966, and which is in evidence, some five different letters as General Counsel's Exhibit 7, did an employee, a pensioner have the right to decline to participate in this new, in a sense new, program and continue to participate in the one he had just been in? A. Oh, yes, absolutely.

Q. As a result of the institution of that program, is it correct that certain employees who were not contractually entitled to receive net payment, say, toward the cost of their medical insurance or Medicare, did, in fact, receive some three dollars a month for the cost of that? [92] A. There was—they would be receiving three dollars.

Q. In fact, every employee who retired since 1962 was not entitled to any contribution from the Company toward his medical insurance? A. That is correct, none of those people were entitled to any contribution from the Company.

Q. And those who retired after 1962, would be, after July 1—— A. Yes.

Q. —entitled to two dollars a month—— A. That is correct.

Q. Mr. Rodgers, did the Company ever offer this program of March 24, 1966, or did it on or about March 24,

1966 offer that plan with respect to the future retirees? A. No, sir, we did not.

Q. Or was it just made available to those who had already retired? A. That is correct.

Q. Has anyone retired since March 24, 1966? A. Yes, sir.

Q. Is this program available to them? A. No, sir, it is not.

Q. So that on March 24, 1966, it was not announced as an available program to people who were then working in the collective bargaining unit? A. No, sir, it was not.

[93] Q. I believe it was testified by Mr. Williams you had some series of meetings with the Union in what, late summer or early fall, 1966—— A. Yes, sir.

Q. —with respect to grievance matters and ultimately with respect to the contract extension? A. Yes, sir.

Q. Do you recall such a meeting? A. Yes, sir.

Q. Was there any proposal made to the Union at that time with respect to some sort of medical insurance program with respect to the retired employees? A. Yes, we made a proposal to provide a program of insurance which would provide for a three-dollar contribution for those that retired after the signing of that extension agreement.

Q. What was the Union's response to this proposal? A. The Union rejected our proposal.

Q. Did they make any counter proposal themselves? A. No, they did not.

Q. Between March 24, 1966 and October 11, 1966, did you receive any request from the Union to bargain with respect to medical insurance program for retired employees? A. No, sir.

Trial Examiner: I think that's admitted as a result of this question I asked of Mr. Williams on the stand.

[94] Mr. Curran: General Counsel alleges a continuing refusal to bargain——

Trial Examiner: I understand that, I pinned him down, I wanted to narrow the issue.

I asked: Was it your contention that the Union made an offer which the Employer rejected? He said they made no proposals. So that is not an issue in the case.

Q. (By Mr. Curran) Mr. Rodgers, at any time after March 24, 1966, did any representatives of the Union request that the Company return to what we might call the pre-March 24 status quo with respect to medical insurance for retired employees? A. No, sir.

Mr. Curran: I have no further questions.

Trial Examiner: All right. I think we'll take a ten-minute recess. Let's go off the record.

(Recess had.)

Trial Examiner: On the record.

Cross Examination

Q. (By Mr. DuRose) Mr. Rodgers, you testified concerning a Memorandum Agreement which was signed in 1962 and which was introduced into evidence as Respondent's Exhibit No. 2, I believe? A. That's correct.

Trial Examiner: No, Respondent's Exhibit 2 is the Decision and Direction of Election.

[95] Mr. DuRose: Oh, here it is, Respondent's Exhibit No. 5.

The Witness: Dated July 29, that's correct.

Q. (By Mr. DuRose) Was that agreement signed on July 29? A. Yes, sir.

Q. It affected people who retired after June 27, 1962? A. Yes, sir, the date of June 27, 1962.

Q. And thereafter? A. That is correct, mm-hmm.

Q. Now, you stated earlier that you were the person at the March 21st meeting who explained what the Company's position would be concerning medical insurance for retirees and you mentioned something concerning the non-duplication feature of the Company's plan.

Would you explain it to me, please?

A. Yes, sir.

We indicated to the Union during those discussions that we felt the value of the present plan that they operated would be lessened by the benefits provided by the Medicare program and the fact that the Company's program of insurance included a non-duplication of the benefits.

Q. Are you familiar with the language of that provision? A. I know it's contained in the certificate of insurance, mm-hmm.

Q. Do you know what the wording is? A. I couldn't quote it verbatim.

[96] Q. Does it say that the plan will not duplicate payments made under other insurance plans by other employers? A. By other group employers to which the Company, I believe makes contributions.

Q. Was there something said at that time that the Company considered the Medicare plan to be an insurance plan of another employer? A. It's our opinion that this would apply, that's correct.

Q. Was that communicated to the Union? A. Yes, sir, in our opinion, yes.

Trial Examiner: My notes show that Mr. Williams testified that it was communicated to him.

The Witness: Yes, sir, that's right.

Trial Examiner: I'm not saying that I'm ruling it is or is not a duplicate feature, but Mr. Williams testified that he was told that at the meeting.

I don't think that's a matter in dispute.

The Witness: Yes, sir.

Q. (By Mr. DuRose) I believe you were asked to direct examination whether or not any of the collective bargaining agreements that the Company had with the Union had any provisions concerning pensioners. You answered that they did not.

Is that correct?

A. The collective bargaining agreement, that is correct.

[97] Q. When you talked of the collective bargaining agreement, I assume you mean the document entitled Collective Bargaining Agreement—— A. Yes, sir, dated October 20, 1964, entitled——

Q. But there are other agreements that the Company has with the Union? A. The Pension Agreement.

Q. And the Memorandum Agreement? A. Yes, sir, we have certain memorandum agreements with the Union, yes, sir.

Q. Now, when you announced the Company's proposals at the March 21 meeting, did you tell them when that was going to go into effect? A. No, we didn't specify a date at that time.

Q. Now, as far as the insurance which the Company has with the insurance carrier, how is the premium on that policy determined? A. The policy is determined by the insurance carrier.

Mr. Curran: I object.

Trial Examiner: I'll sustain the objection.

Mr. Curran: I object.

Trial Examiner: I've sustained the objection. That's not an issue in the case.

Q. (By Mr. DuRose) Now, at the March 21 meeting, was anything said concerning any agreements that the Company had [98] with respect to the Glassworkers Union? A. No, not to my recollection, no, sir, not at that meeting.

Q. At the March 21 meeting, did the Company take the position that it did not have to bargain with the Union concerning this cancellation of the insurance? A. I don't think, I don't believe we took that position at this meeting with them.

Q. Did you ever take that position? A. We told them what our plans were in terms of the rights to the retired employees as previously stated in my testimony.

Mr. DuRose: Nothing further.

Cross Examination

Q. (By Mr. Riemer) Mr. Rodgers, how many retirees of the Barberton bargaining unit are there as of March 1966? A. As of March '66, roughly speaking, give or take, about a 190.

Trial Examiner: That's remarkably close correspondence to Mr. Williams' estimate who thought it was 200.

Q. (By Mr. Riemer) When an employee goes on retirement and is eligible under the pension program for retirement having served the prerequisite number of years and having reached the age and being otherwise qualified,

does the Company notify the Union of his retirement? A. Yes, the Union receives a weekly notice of employees who [99] are separated from the bargaining unit for various reasons.

Q. Including—— A. Including retirements, yes, sir.

Q. Do you furnish the Union a copy of the employee's application for a pension? A. No, we do not, to my knowledge. No, to my knowledge, it's never been given to the Union as a standard procedure.

Trial Examiner: Is there any contention that this failure to give that is an unfair labor practice?

Mr. Riemer: No, no.

Trial Examiner: If so, I don't see that as a point.

Mr. Riemer: No, I just think, well, I take it——

Trial Examiner: I just didn't quite understand your question, Mr. Riemer.

Mr. Riemer: The purpose of the question is to show—well, we'll pass along.

Q. (By Mr. Riemer) Now, in 1960, Mr. Rodgers, the Company did bargain with the Union concerning pension rights of employees, did it not? A. We had negotiations for an extension agreement in 1960 which covered the Pension Agreement—the labor agreement——

Q. And your understanding with respect to pensions are customarily or procedurally incorporated in a separate document such as General Counsel's Exhibit 4 in evidence? A. That is correct.

[100] Q. You do not contend that you do not bargain with the Union about pensions, do you? A. About pensions?

Q. Yes. A. No, sir, I do not.

Q. Now, prior to March or let's say, March 15, 1966, to pick a date, prior to any change, what were the plans then in effect covering retired employees? A. What were the plans covering all retired employees?

Q. Within the bargaining unit. A. Well, I think I'll have to clarify that question.

When you state "Retired employees within the bargaining units," retired employees are not within the bargaining unit.

Q. I meant retired employees from the bargaining unit, those who had been and now are—— A. I think I can recite that. There were a group of retired employees who retired sometime prior to 1949 who had no program of medical insurance. There were another group of employees, retirees, retired in '49, the specific date I can't quote exactly, up through the period of January 1, 1960, who had a ten-dollar a day program as we have commonly referred to it to which the Company made no contributions.

Then, we had a group of employees retired under the January 6, 1966 agreement to provide fourteen-dollar a day plan as commonly described in my previous testimony and these [101] employees had an election to take that plan, to take that plan on retirement. They could opt to continue it by timely paying the applicable premium rate in effect at the time and thereafter.

The next group of retirees would be those who retired under an agreement we arrived at dated July 29, 1962, and we stated those employees who retired as of or after November 1st, 1962, with the same program of a fourteen-dollar a day plan available to them provided they elected to carry that plan. If they carried it and timely paid the full premiums, the Company would contribute two dollars monthly toward the cost of that program of insurance and the two dollars would only be applicable to the program of insurance.

We then had a revision in 1964 as is on the record of a four-dollar contribution.

Q. Oh, well, at the meeting on March 21, 1966, when you were in conference with the Union Committee, neither you nor Mr. Harris stated at that time that you were going to send a letter to these various groups of retired employees explaining what the Company intended to do with respect to Medicare and their insurance coverage, did you? A. Yes, sir, I stated previously in my testimony on that point, on that date we had been studying the program of insurance and the effect of Medicare and we'd like to discuss with them the conclusions that we had drawn and that we said

[102] it was our plan then to write to our employees at that time and advise them, urging them to sign up for Medicare, and that we intended to just discontinue the then existing program of insurance and then I followed my testimony with respect to the various facets of our offer.

Q. Was this the first time that the Union was notified that you intended—withdraw that. Let me rephrase that question.

Was this the first time that the Union was notified that the Company planned to cancel insurance for retirees? A. Yes, this is the first mention of it.

Q. Before Medicare went into effect, again thinking in terms of March 1966—— A. Mm-hmm.

Q. —was there any front end deductible, so to speak, on the insurance program then provided for retirees? A. No, there was no front end deductible in that plan.

Q. Well, then, will you tell us when it became effective and what it covered?

Trial Examiner: Are the terms of these various plans in issue here? I see why you want to introduce evidence that there were plans but now you're talking about the premiums and so forth.

Go ahead. I hate to go into the collateral issues, but go ahead. There's no objection to the question.

Answer the question, Mr. Witness.

[103] A. Well, I can only answer to this extent, applied to the bargaining unit. We had negotiations with the Union in 1964 which removed the front end deductible of the insurance. The fourteen dollar a day plan had made other provisions but this was applicable to that—the fourteen dollar a day plan was not involved, we're talking about the semi-private plan that the employee had.

Q. You know, Mr. Rodgers, do you not, at this meeting on March 21, Mr. Williams or some member of the Union Committee asked if any provision would be made by the Company for those benefits not covered by Medicare once it became effective? A. I think Mr. Campbell was the only one that made this comment, is my recollection. I think he

made a simple statement, it was intended that the program of insurance would cover the deductible items under Medicare. We indicated that this would probably be covered considering that they were not covered by the Medicare. Then the Company plan would take up, if they had that plan.

Q. That was Mr. James Campbell? A. As I recall, yes, sir.

Q. The mandatory retirement of employees at age 65 was an item that was negotiated by the Company in the last contract? A. No, sir, my recollection is that it was negotiated in 1962.

Q. '62? At least, it was negotiated with the Union? [104] A. Yes, sir.

Q. How many of the retirees of this group of a 190 have cancelled the insurance made available to them by your carrier, Equitable? A. I recollect the answer Mr. Williams gave still prevails, about 15.

Q. Were the letters which are attached to General Counsel's Exhibit 7, letters dated March 24, 1966—— A. I'm familiar with them, yes.

Q. —shown to the Union Committee on March 21? A. No, sir, they were not.

Mr. Riemer: I have nothing further.

Redirect Examination

Q. (By Mr. Curran) Were they in existence on March 21? A. No, sir, they were not.

Mr. Riemer: I beg your pardon, yes, I do. May I?

Trial Examiner: Go ahead.

Cross Examination (Continued)

Q. (By Mr. Riemer) Was the decision of cancellation such as you have described it announced on March 21 a Barberton decision or was it a Pittsburgh decision relayed to Barberton for execution here? A. This was a management decision. Mr. Harris has responsibility.

Q. If it's a management decision, from whence did the [105] management decision emanate? A. If you describe your term "emanate."

Q. Where did it come from, Pittsburgh or Barberton? A. Barberton.

Q. The local management then at Barberton was responsible for the promulgation of this plan? A. The Industrial Relations Department, and in my advisory capacity reviewing this, with recommendations to the plant management, and the plant management has the decision to make.

Q. I thought I understood you to say sometime in November 1965, Mr. Rodgers, that this question had been referred to the Pitssburgh Plate Glass or your headquarters in Pittsburgh? A. That was Mr. Williams' testimony, not mine.

Q. You didn't so testify? A. No, sir.

Q. Perhaps I misunderstood.

Trial Examiner: I think that Mr. Williams so testified, my notes show.

Mr. Riemer: I think my notes show that Mr. Rodgers did too.

Trial Examiner: You keep better notes than I do, Mr. Riemer.

The Witness: I think my statement was that we would take a look at it and discuss the matter with our Industrial Relations Department and our Insurance Department. That was [106] in connection to what we would do afterwards.

Q. (By Mr. Riemer) Did you take this question up with the Industrial Relations Department in Pittsburgh and also the Equitable Life Insurance Company? A. Yes, sir, this was reviewed with them.

Q. Was the Barberton announcement or pronouncement of March 21, 1966 reached after consultation with Pittsburgh and Equitable? A. There were numerous discussions with the Company officials and the insurance carrier concerning this problem.

Mr. Riemer: I have nothing further.

Trial Examiner: You may step down.

Mr. Curran: Oh——

Trial Examiner: Let's not have re, re, re, redirect and re, re, re, redirect. I'm going to cut off the examination of the witness with your questions, Mr. Curran, unless they're serious ones and then we'll give them re, re, redirect.

Go ahead.

Mr. Riemer: This is redirect.

Mr. Curran: As a result of Mr. Riemer's questioning.

Redirect Examination

Q. (By Mr. Curran) Did you ever receive a proposed program from the Equitable Life Insurance Company as a supplement to Medicare prior to March 24, 1966?

Mr. DuRose: Objection.

[107] Trial Examiner: Sustained.

Mr. Curran: I think I have a right to——

Trial Examiner: He brought up the question, they were inadmissible but weren't objected to. I'm not going to go into matters just because they were in. Now that there is an objection, I'm going to sustain it.

Mr. Curran: No further questions.

Trial Examiner: All right. You may step down. I was premature the last time.

The Witness: That's right.

Trial Examiner: I guess it was.

(Witness excused.)

William R. Harris

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

Trial Examiner: Give your name and address to the Reporter.

The Witness: W. R. Harris, The Pittsburgh Plate Glass Company, Chemical Division, Barberton, Ohio.

Direct Examination

Q. (By Mr. Curran) What is your home address? A. My home address is 106 Schocalog Road.

Trial Examiner: I might say that the facts are substantially in agreement. There is very little dispute so [108] that you may not go into the cumulative matters. I don't mean or I'm not saying that you can't do——

Mr. Curran: The witness will not be questioned as to the meeting of March 21, 1966, but solely as to the Company's version of the telephone conversation on March 23, 1966, in deference to the Trial Examiner.

Q. (By Mr. Curran) Will you state your position? A. Works Manager.

Q. Barberton plant? A. Barberton plant.

Q. How long have you held that position, Mr. Harris? A. About four years.

Q. And how long have you held positions with the Company at the Barberton plant? A. 23 years.

Q. Mr. Harris, directing your attention to March 23, 1966, did you have a telephone conversation with Mr. Williams on or about that time? A. Yes, I called Mr. Williams. It was in the afternoon, I don't recall the exact time.

Q. Where did you call him? A. When?

Q. Where was Mr. Williams when you called him? A. He was at the Union Hall.

Q. He answered your call, did he? [109] A. Yes.

Q. You recognized his voice? A. Yes.

Q. Can you tell us what was said in the conversation and who said it? A. Well, I advised Bill after some greetings that we had reviewed our position in relation to their comments on what we had indicated we were going to do in the meeting on March 21 and in taking these comments that they had made into consideration, we had revised the position that we were taking with the pensioners and that we would be writing them individually indicating that the plan of medical insurance that they had retired under would be available to them voluntarily if they paid the premium.

That if they did not take this company policy or dropped the company policy, that we would pay them three dollars.

I covered the spouse under 65, that we would have the same single plan available for her if they decided to carry it, and disabled retirees under 65.

I covered the non-duplication provision.

Then, I indicated to him that we were concerned about the March 31st date approaching and that we had written our pensioners around the 1st of March sending them a booklet on Medicare and that we were concerned that we should get some communication out to them prior to March 31st so that they [110] would sign up for the benefits to this program.

He asked me if he could have—if I would give a copy of those letters to the Union. I said, "Yes, we would send them over."

In substance, this is about the conversation.

Q. Did Mr. Williams—well, you were at the meeting of March 21st, of course? A. Yes.

Q. At that meeting I think you indicated—the Union indicated its opposition to the program the Company proposed on the 21st? A. Yes.

Q. Did Mr. Williams say anything to you in your telephone conversation on March 23 which indicated opposition or whether he favored or opposed the program that you were describing to him? A. I do not recall him indicating this, one way or another.

Q. Did he say anything to you that this was a bargainable issue in that conversation? A. March 24?

Q. 23rd. A. Or 23rd, not that I recall.

Q. After the March 21st meeting, did Mr. Williams contact you with respect to any conversation that he had with respect to his attorney? [111] A. With respect to any conversation that he had with his attorney, no.

Mr. Curran: That's all.

Cross Examination

Q. (By Mr. DuRose) You said in your direct testimony, in your conversation with Mr. Williams on March 23, that

you had covered the non-contributory aspect of the plan, is that correct? A. Non-duplication.

Q. Non-duplication? A. This was a question that Bill asked me, would the non-duplication provision be applied the same that it is in our employees insurance, the same way we apply it. My answer to that was, "Yes, we would apply it the same way."

Q. What this meant was that your plan would not cover any payments made by Medicare, is that right? A. This is right.

Mr. DuRose: No further questions.

Cross Examination

Q. (By Mr. Riemer) Excuse me, Mr. Harris, but this conversation, telephone conversation, that you had with Mr. Williams on March 23rd, it took place in the afternoon, did it not? A. My recollection was that it was in the afternoon.

Q. You search your recollection, please, and tell us whether [112] you can recall saying to Mr. Williams in substance or in effect that it was the position of the Company that once a man retired, the Union no longer had any right to bargain for him? A. I have said this on occasion to Mr. Williams, I don't know what the occasion might have been.

Q. Did you say it on March 23 in this conversation about insurance? A. I do not recall having said this.

Q. Did you call Mr. Williams or did he call you on that day? A. I called him.

Q. And you called him for the purpose of telling him that you reviewed the discussion which had occurred previously on March 21? A. That's right.

Q. Do you recall saying that? This was after you had told Mr. Williams what you intended to do or what the Company intended to do, that you were not going to bargain with the Union about it? A. No.

Q. You did not say that? A. I don't recall saying that.

Q. Does this mean you might have said it? A. Well, on March 21st, Mr. Williams—I did say to him that we were

not going to institute a supplemental plan of [113] insurance and that we were not going to bargain on it.

Q. And you also said that you were going to cancel—— A. On March 21st?

Q. —your insurance program? A. Yes.

Q. Have you any recollection in the conversation with Mr. Williams on March 23rd of saying in words or substance to the effect that since the Pittsburgh Plate Glass contributed to the Social Security Administration—or System, rather, it considered this as a contribution to another insurance plan or program? A. I recall this discussion but my recollection is this took place on March 21st in the discussion on the non-duplication.

Q. Well, what was that discussion?

Trial Examiner: He testified to that.

Mr. Riemer: What was it?

Trial Examiner: He didn't testify to anything on 21.

Mr. Riemer: That's right.

Trial Examiner: Your examination must be limited to what was on direct.

Mr. Curran: I object.

Mr. Riemer: You're limiting the examination——

Trial Examiner: Yes.

Mr. Riemer: The only thing, your Honor, is that——

Trial Examiner: Otherwise, the witnesses have testified [114] that the Employer did say it. Now, the particular day is unimportant to me. The record is clear that the Employer has taken the position at sometime that this was not a bargainable matter.

Is that what you're trying to establish?

Mr. Riemer: I have no further questions.

Mr. Curran: I have no questions.

Trial Examiner: All right, you may step down, Mr. Harris.

(Witness excused.)

Mr. Curran: Respondent rests.

Trial Examiner: Is there any rebuttal?

Mr. DuRose: No.

Trial Examiner: Not from the General Counsel. How about Mr. Riemer?

Mr. Riemer: What is that, sir?

Trial Examiner: Do you have any rebuttal?

Mr. Riemer: (shaking head negatively.)

Trial Examiner: Apparently, then, there isn't any.

Mr. Curran: I would like to make a motion.

Trial Examiner: All right.

Mr. Curran: I move to dismiss the Complaint paragraphs 9, 10, 12, 13, 14, 15, and 16, for the reason that it does not allege that the Respondent has taken any unilateral action with respect to the employees in the unit appropriate [115] for the purposes of collective bargaining as that unit is set forth in Paragraph 5 of the Complaint since:

One, the language of Paragraph 5 does not include retired employees;

Two, the Union was not certified for a unit which included retired employees;

Three, the Union and Respondent have contractually agreed in the Pension Agreement that the retired employees are no longer employees under the Labor Agreement;

And, finally, four, that the Board and the Court have previously determined that retired employees with no reasonable expectation of employment are not employees within the meaning of Section 2, Subsection 3 of the Act and accordingly there is no duty to bargain with reference to the wages and hours and working conditions of those employees.

Further, I move to dismiss the Complaint paragraphs 10, 11, 12, 13, 14, and 15, 16, for the reason that the Complaint does not allege that the Respondent has taken any unilateral action with reference to the employees in the unit described in Paragraph 5 of the Complaint.

General Counsel has in its Complaint clearly recognized that retired employees are not included in the unit in Paragraph 6(b), 7, 8, 9, 10, 11, and 12, he has recognized

that the retired employees are not set forth in the unit set [116] forth in Paragraph 5 which is described——

Trial Examiner: I think he may have made a prima-facie case, I'll deny your motion.

I'll still have to examine your law to see if your position is well taken in your motion. If it is, I'll grant it. As of now, I don't believe I can grant your motion. As a matter of law this is only——

Mr. Curran: I don't know, if there is an allegation that retired employees are included in the unit set forth in Paragraph 5——

Trial Examiner: It may be that your point is well taken. As of now, I'm going to deny your motion.

* * * * * * * * * * *

No. 19875

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, *Petitioner*, v. NATIONAL LABOR RELATIONS BOARD, *Respondent*.	ON PETITION to Review and Cross-Application to Enforce an Order of the National Labor Relations Board.

Decided and Filed June 10, 1970.

Before: WEICK, CELEBREZZE, and BROOKS, Circuit Judges.

CELEBREZZE, Circuit Judge. This cause is before the Court on the petition of the Pittsburgh Plate Glass Company, Chemical Division, [hereinafter "the Company"] to review, and upon the National Labor Relations Board's cross-application to enforce a Labor Board order[1] requiring the Company to cease and desist from refusing to bargain collectively with the Union about changing health insurance benefits for previously retired employees, who prior to their retirement, had been actively working for the Company in the collective bargaining unit represented by the Union, and who, upon their retirement, became covered by a Union-negotiated retirement benefit plan. The Board found that by proposing improvements in their retirement health plans to retirees individually, rather than bargaining such alterations collectively

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[1] The Board's Decision and Order are reported at 177 NLRB No. 114 (1969).

with the Union, the Company "unilaterally modified" the retirement benefits in violation of Section 8(a)(5) and (1) of the Labor-Management Relations Act, 1947, as amended, 29 U.S.C. § 158(a)(5) & (1) (1964). Local Union No. 1, Allied Chemical and Alkalai Workers of America ["the Union"], which filed the charges initiating these proceedings, has intervened herein, and several other interested parties have filed briefs *amici curiae*.[2] This Court has jurisdiction under Section 10(e) and (f) of the Act.

The facts, which are essentially undisputed, raise a question of first impression, so far as we are able to determine, before this or any other Court under the National Labor Relations Act, as amended.

I.

Since 1949, the Union has been the exclusive bargaining representative for Company employees in a unit composed of:

> "All employees of the Employer's plant and limestone mine at Barberton, Ohio working on hourly rates, including group leaders who work on hourly rates of pay, but excluding salaried employees and supervisors within the meaning of the Act."

In 1950, the Union and the Company negotiated provisions for an employee group health insurance plan. An oral agreement was made that retired employees could also participate in the plan by paying a stipulated premium, which would be deducted from their pension benefits. The Company made no contribution toward retired employees' health insurance

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[2] Briefs urging enforcement of the Board's order were filed by the American Federation of Labor and Congress of Industrial Organizations; the Amalgamated Transit Union, AFL-CIO; the International Union, UAW; and the United Steelworkers of America, AFL-CIO. Briefs urging that the Board's order be set aside were filed by the Union Carbide Corporation; the National Association of Manufacturers of the United States of America; and the Chamber of Commerce of the United States of America.

premiums under this program. Except for an improvement unilaterally instituted by the Company in 1954, and another improvement negotiated in 1959, this program remained unchanged in all relevant respects until 1962.

In 1962, the parties entered into a memorandum agreement by which the Company agreed to contribute $2.00 per month toward the cost of the monthly premium for medical benefits, but only for persons who retired from the Company's employ after June 27, 1962. Persons already retired prior to that date received no such contribution. In these negotiations the parties also agreed to make age 65 the mandatory retirement age.

During negotiations for a new labor contract in 1964, the parties again bargained about insurance benefits for retired employees. The Company agreed to increase its contribution to medical benefits for persons retired after June 27, 1962 from $2.00 per month to $4.00 per month. However, anticipating the enactment of Medicare legislation, the agreement provided that if a government health program were enacted, the Company could reduce its contribution by the amount of the 1964 increase, *i.e.*, $2.00 per month.

On November 23, 1965, following the enactment of Medicare and during the term of their outstanding collective bargaining agreement, the Union asked the Company to engage in mid-term bargaining for the purpose of re-negotiating insurance benefits for retired employees of a type not available under Medicare. The Company took the Union's request under advisement and responded at a meeting held on March 21, 1966. First, the Company announced its intention to reclaim its contribution of the extra $2.00 per month beginning July 1, 1966, the effective date of Medicare. The Company's right to do this under the 1964 contract is not in dispute. Second, the Company said it intended to cancel the negotiated health insurance plan for retired employees because, in its opinion, the enactment of Medicare made this insurance useless, and to substitute therefor a $3.00 monthly contribution

for supplemental Medicare benefits for each employee who retired after July 27, 1962. Third, the Company rejected the Union's request to bargain for a supplemental insurance plan, and challenged the Union's right to bargain for retired employees at all.

The Union conceded the Company's contract right to reduce its contribution, but challenged the Company's right to unilaterally substitute supplemental Medicare for the negotiated health program.

Two days later, on March 23, 1966, the Company told the Union that, having reconsidered its position, the Company would not unilaterally substitute Medicare for the negotiated health insurance. Instead, the Company said it intended to mail letters to retired employees announcing that they could choose to withdraw individually from the negotiated health insurance plan and, in lieu thereof, the Company would contribute $3.00 per month towards supplemental Medicare premiums.

The Union objected to this proposed action, asserting the right to bargain about any change in the contract affecting the health insurance plan. Nevertheless, the Company refused to bargain with the Union, and, on March 24, 1966, mailed the aforementioned letters to retired employees with the result that 15 out of 190 retirees elected the $3.00 contribution to Medicare instead of the negotiated $2.00 contribution to the private health insurance program.[3] In response to the Company's action, the Union filed the instant charges.

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[3] That letter, which forms the basis of this controversy, provided:

Dear Pensioner:

The matter of your Hospital-Medical Insurance is of the utmost importance to you; therefore, we recommend that you read this letter carefully.

The program of Hospital and Medical benefits under the Federal Social Security Act, known as Medicare, will become effective on July 1, 1966. Any person who has attained age 65, whether they ever worked and were covered by Social Security or not will be eligible to receive benefits under this program.

The Board's Trial Examiner conducted hearings into the complaint, found the foregoing to be the facts, and concluded that pensioners and retirees are not employees as defined by Section 2(3) of the Act, are not employees within the meaning of Section 8(a)(5), and are not within the bargaining unit; that a Company has no statutory duty to re-negotiate benefits for previously retired employees; that the letter from the Company to the retirees did not constitute a "unilateral change" of any provisions of the negotiated contract or a mid-term change within the intendment of section 8(d). He did not find that the Company's action had the purpose or effect of undermining employees' section 7 rights. Finding violations of neither section 8(a)(5) nor section 8(a)(1), the Examiner recommended dismissal of the complaint.

Hospital Benefits under Medicare will be received automatically by any person 65 years of age or over; no enrollment or payment of premiums is required. However, *Medical Benefits* are voluntary and do require enrollment and the payment of a premium of $3.00 a month per person. Enrollment for Medical Benefits must be completed by March 31, 1966, otherwise, enrollment will be delayed to a future date and benefits will be lost.

You are urged to enroll for the Medical benefits available to you as soon as you become eligible since at present you are under 65 years of age. If you have any questions concerning the program, contact your nearest Social Security office when appropriate to do so.

As a pensioner who at present is under age 65, you have been enrolled in a program of Hospitalization-Medical Insurance, as furnished by the Equitable Life Assurance Society, your participation in this program of Insurance for either single coverage or for coverage for you and your spouse has been a voluntary election on your part, and enrollment has been conditioned on your timely payment of the full monthly premium for the type coverage you elected to carry.

It is necessary to inform you at this time, that in your case, the program of Insurance provides that the current Company monthly contribution of $4.00 will be reduced to a $2.00 monthly contribution when Social Security Hospital-Medical benefits program goes into effect in July 1966. This is in accordance with prior arrangements on this matter. However, this reduction will not take place until the month following the month in which you become age 65 or are eligible for Social Security Hospital-Medical benefits.

Should you elect to continue your present coverage *after you become age 65* and are eligible for the Social Security Hospital-

The Board adopted the Examiner's findings of fact, but disagreed with his construction of the Act. The Board held: that retired employees are "employees" within the meaning of the statute for the purposes of bargaining about changes in their retirement benefits; that, in the alternative, renegotiating retirement benefits for retirees is within the contemplation of the statute because it "vitally affects active bargaining unit employees"; that the Company had "unilateral-

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Medical Program, the same benefits as outlined in the Certificate of Insurance will continue. We must remind you, however, in considering continuance of your present program of Hospitalization and Medical Insurance that, with respect to this plan there will be no duplication of benefits that are also paid for under the Medicare program.

The Company would like also to inform you that upon your reaching age 65, should you elect to voluntarily discontinue your enrollment in the present Hospitalization Medical program of insurance then your monthly premiums would no longer be deducted from your pension check, and the full amount will be available to you following your withdrawal from the plan.

In the event you do elect to discontinue your present enrollment, after you reach age 65, the Company will then make a contribution of three dollars ($3.00) per month to you, which amount would cover the current individual cost to you for your Social Security enrollment.

If after you reach age 65 and elect to discontinue your present enrollment, but your spouse is under age 65, and not yet eligible for the Social Security Hospital-Medical program you may elect to continue her in the present program of Insurance as currently furnished by the Equitable Life Assurance Society, until she reaches age 65 or becomes eligible for the Social Security Hospital-Medical Program. In order to enroll her in this manner you must notify the Company and timely pay the full cost of the premium for single coverage for your spouse. The initial cost of this coverage will be $5.71 per month effective July 1, 1966.

If you have any questions concerning this matter, you may contact Mr. Frank Ruehling in the Insurance Department at the Barberton Plant.

Yours very truly,

W. R. Harris

W. R. Harris

The above-quoted letter was mailed to retirees under age 65 carrying insurance to which the Company made a contribution. Other letters, explaining retirees' rights under Medicare, the negotiated retirement health plans, and the proposed supplemental Medicare contributions, were mailed to: retirees having no insurance coverage; retirees carrying plans of insurance to which the Company made no contribution; retirees carrying insurance to which the Company contributed; and retirees under age 65 carrying insurance to which the Company made no contribution.

ly changed" retirees' health benefits in violation of Section 8(a)(1) and (5) of the Act.[4] Accordingly, the Board ordered the Company to cease and desist from refusing to bargain collectively with the Union about adjustments in health insurance plans for retired employees, and otherwise "interfering with, restraining, or coercing employees in the exercise of" their section 7 rights. In addition, the Board ordered the Company to rescind any "unilaterally instituted" adjustment in retirees' health benefits upon request of the Union.

The sole issue in this case is whether an employer may bargain individually with retired employees about alterations in their negotiated retirement benefits, or whether alterations in retirees' retirement benefits are mandatory subjects of bargaining with respect to which an employer must bargain collectively at the request of the Union.

The Labor-Management Relations Act enjoins employers to bargain collectively[5] and in good faith with the bargaining agents of their employees[6] about "wages, hours, and other terms and conditions of employment."[7] It is well established,

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[4] Board Member Zagoria dissented from the Board's Decision and Order.

[5] Section 8(a)(5), Labor-Management Relations Act, 29 U.S.C. § 158(a)(5) (1964) provides:

> "(a) It shall be an unfair labor practice for an employer —
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

[6] Section 9(a), Labor-Management Relations Act, 29 U.S.C. § 159(a) (1964) provides the statutory method for selection of a bargaining agent:

> "(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."

[7] Section 8(d), Labor-Management Relations Act, 29 U.S.C. § 158(d) (1964) defines the collective bargaining obligation as:

> "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable time and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ."

and not in dispute here, that pensions and insurance benefits to be enjoyed by employees after retirement are "wages" for the purposes of the statute, albeit deferred ones, and that insofar as they accompany a provision specifying a mandatory retirement age, as is present in this case, they are also "conditions of employment." *W. W. Cross & Company*, 77 NLRB 1162 (1948), enf'd, *W. W. Cross & Company* v. *NLRB*, 174 F.2d 875 (1st Cir. 1949); *Inland Steel Company*, 77 NLRB 1 (1948), *enf'd, Inland Steel Company* v. *NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied on this issue*, 336 U.S. 960; *National Labor Relations Board* v. *Black-Clawson Company*, 210 F.2d 523 (6th Cir. 1954). Being mandatory, as opposed to permissive, subjects of bargaining, if a company refuses to bargain about active employees' retirement benefits when the employees' bargaining representative requests the opportunity to do so, it violates not only section 8(a)(5), but also section 8(a)(1), which prohibits employers from interfering with, restraining, or coercing employees in their section 7 right "to bargain collectively through representatives of their own choosing."[8] Furthermore, being mandatory, the matter can be pressed by either party to an impasse, or be used, under appropriate circumstances, to block an agreement or justify a strike or lockout. *See, e.g., National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958).

However, the issue in this case is not whether retirement benefits for *active* employees are mandatory subjects of collective bargaining. The issue is, once retirement benefits have

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[8] Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1) (1964).

Section 7 of the Act, 29 U.S.C. § 157 (1964), provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

been negotiated for active employees who have retired and begun collecting benefits, whether an employer may propose improvements in benefits to the retirees individually, or whether retirees are "employees" under section 8(a)(5), changes in whose benefits must be collectively bargained with the union.[9] We find that retirees are not "employees" within the meaning of section 8(a)(5) and that the Company was under no constraint to collectively bargain improvements in their benefits with the Union.

II.

The Board found that persons who have retired from the service of an employer may be considered "employees" with respect to whom the employer must bargain collectively because, as a general proposition, coverage of the Act is not limited to persons currently in the employ of a particular employer. It is true that for many purposes the Act extends protection to persons not currently serving employers. How-

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[9] This is not the case of an employer unilaterally abrogating contractually vested retirement benefits of retirees, as it might have been had the Company unilaterally substituted contributions to supplementary Medicare plans for the negotiated health plans, as it originally planned to do. In that event, the retirees would have had an appropriate remedy, either by invoking the grievance procedure of the contract under which they received the benefits, or by bringing an action under Section 301 of the Labor-Management Relations Act, 1947, 29 U.S.C. § 185(a) (1964). *See United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). Even then, however, the Company's conduct would not rise to the level of an unfair labor practice in the absence of a showing of bad faith in arbitration or a reasonable tendency of undermining the union as the bargaining agent for active employees. *See Sinclair Refining Co.* v. *NLRB*, 306 F.2d 569 (5th Cir. 1962); *Independent Petroleum Workers of New Jersey* v. *Esso Standard Oil Co.*, 235 F.2d 401 (2d Cir. 1956); *National Labor Relations Board* v. *Pennwoven, Inc.*, 194 F.2d 521 (3d Cir. 1952).

Nor is this case to be confused with those holding it an unfair labor practice under section 8(a)(5) for an employer to short-circuit the collective bargaining process by bypassing the union and bargaining directly with *active* employees or instituting changes unilaterally during the bargaining process. *See, e.g., National Labor Relations Board* v. *Katz*, 369 U.S. 736 (1962).

Moreover, we do not decide the extent to which a company violates the Act by making deceptive offers to retirees, the effect of which may be to defraud them into accepting reduced retirement benefits.

ever, by plain meaning an employer has no statutory duty to bargain collectively with respect to persons who are not "his employees."

Section 2(3) of the Labor-Management Relations Act, 1947, 29 U.S.C. § 152(3) (1964), provides:

> "When used in this subchapter –
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> • • •
>
> "(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, *unless this subchapter explicitly states otherwise*, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . [Emphasis added]."

As the Supreme Court indicated in *Phelps Dodge Corporation* v. *NLRB*, 313 U.S. 177 (1941), the purpose of this broad definition, which was borrowed almost wholly from the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1964), was to insure against interpretations, such as had at one time been made under the Clayton Act, that persons not employed by a particular employer were prohibited from peaceful picketing to publicize a dispute because they did not stand in the proximate relationship of employees to the employer involved. *Id.* at 191-92. In addition, it was intended to dispel any notions that labor unions had to limit the extent of their organizations to employees of a single employer. In twice emphasizing the statutory language italicized above, the Supreme Court made plain its belief that the expansive definition of "employee" in section 2(3) was to give way where "the Act explicitly states otherwise." As a particular example, the Court stated:

> "In determining whether an employer has refused to bargain collectively with the representatives of 'his em-

> ployees' in violation of § 8(5) [now section 8(a)(5)] and § 9(a) it is of course essential to determine who constitute 'his employees.' One aspect of this is covered by § 9(b) which provides for the determination of the appropriaee bargaining unit." *Phelps Dodge Corp.* v. *NLRB, supra,* at 912.

There was nothing strained or unnatural in this interpretation. The statute itself plainly provides that it shall be an unfair labor practice for an employer

> "to refuse to bargain collectively with the representatives of *his employees,* subject to the provisions of section 9 (a)."

This construction is, of course, unaffected by those cases on which the Board relies heavily, making it an unfair labor practice under Section 8(a)(3) of the Act for an employer to discriminate in the hiring of applicants for employment, who were not in the company's employ,[10] registrants at hiring halls,[11] employees of a company taken over by a "successor employer,"[12] employees who have quit,[13] and other persons not currently employed and outside the bargaining unit. Section 8(a)(3) forbids "discrimination in regard to hire or tenure." If prospective employees or those whose employment has ceased because of illegal discrimination were not regarded as within its terms, a refusal to hire for unlawful reasons, and unlawful discharge, could never be unfair labor practices under this section.

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[10] *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177 (1941). *Accord, NLRB* v. *Louisville Chair Co.,* 385 F.2d 922, 925 (6th Cir. 1967), *cert. denied,* 390 U.S. 1013.

[11] *Local 872, International Longshoremen's Association,* 163 NLRB 586 (1967); *Local 1351, Steamship Clerks etc.* v. *NLRB,* 329 F.2d 259 (D.C. Cir. 1964), *cert. denied,* 377 U.S. 993.

[12] *Chemrock Corp.,* 151 NLRB 1074 (1965). *Chemrock* deals with facts and issues entirely different from those present here, however to the extent of any apparent inconsistency, we decline to follow it.

[13] *Goodman Lumber Co.,* 166 NLRB No. 48 (1967).

The Board itself has recognized this distinction between the use of the word in section 8(a)(3) and (5):

> "We do not regard as controlling for purposes of determining for whom an employer must bargain those cases cited . . . which hold that the antidiscrimination provisions of Section 8(a)(3), (4) and (b)(2) of the Act forbid discrimination against applicants for employment. The antidiscrimination provisions refer to 'employees' *generally*, whereas unlike these provisions, Section 8(a)(5) contains specific language requiring an employer to bargain for *'his' employees*. [Emphasis in original]" *Page Aircraft Maintenance, Inc.*, 123 NLRB 159, 163 (1959).

We are similarly unpersuaded by the analogy made by the Board between the word "employee" as that word has been construed for the purposes of Section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186 (1964), *see, e.g., Blassie* v. *Kroger*, 345 F.2d 58, 68-71 (8th Cir. 1965), and the word "employee" as it appears in section 8(a)(5). Section 302 is a criminal provision, making it a misdemeanor for an employer to make payments to a union representing his employees. Section 302(c), under which *Blassie, supra*, was decided, exempts from the operation of the section employer contributions to, *inter alia*, employee trust funds, among which are pension and retirement plans. Not to regard retirees as employees for the purposes of that section would frustrate the purpose of retirement trusts, which have been designated as mandatory subjects of bargaining, by making distributions to retirees from them illegal. The Board's argument that it is an "anomaly" to treat the word differently under the two sections is itself an anomaly.

We also reject the Board's argument that the interpretation of the word "employee" by the Internal Revenue Service under Sections 401(a) and 501(c)(9) of the Internal Revenue Code of 1954, 26 U.S.C. §§ 401(a) & 501(c)(9) (1964), is dispositive of the issues in this case. *See* 26 CFR §-1.401, *as revised*, Jan. 1, 1969.

We find that the general definition of "employees" in section 2(3) is superseded by the explicit statement in section 8(a)(5), and that an employer has a duty to bargain collectively only with the representatives of *his employees.*

We now turn to the issue whether retired employees are employees of the Company for the purposes of section 8(a)(5).[14] Upon this issue the record is clear. Retirement with this Company, as with most other companies, is a complete and final severance of employment. Upon retirement, employees are completely removed from the payroll and seniority lists, and thereafter they perform no services for the employer, are paid no wages, are under no restrictions as to other employment or activities, and have no rights or expectations of re-employment. For these reasons, as will be discussed below, the Board has consistently held that retired employees have no right to vote in representation elections, even when the employer has a right, and they have some expectation, of being recalled to work. *W. D. Byron & Sons,* 55 NLRB 172, 174-75 (1944).

The fact that retired persons may continue to receive pensions after permanently leaving the service of an employer does not entitle them to continued status as employees. Indeed, the receipt by them of retirement benefits further emphasizes the finality of their employment severance.

We find that persons who have retired from the service of an employer are no longer "his employees."

III.

In addition to limiting the employer's bargaining obligation to "his employees," section 8(a)(5) conditions the bargain-

[14] Although the Board's interpretation of the term "employee" is entitled to some weight, *Local No. 207, International Association of Bridge Workers* v. *Perko,* 373 U.S. 701, 706 (1963); *National Labor Relations Board* v. *Hearst Publications, Inc.,* 322 U.S. 111, 130 (1944), the Board made no finding in this case that retirees are employees within the meaning of the Act. In prior cases, however, the Board has expressly found that retirees are not employees for the purposes of the more expansive section 2(3). *See, e.g., Public Service Corporation of New Jersey,* 72 NLRB 224, 229-30 (1947).

ing obligation on the provisions of section 9(a), which provides:

> "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for purposes of collective bargaining . . . ."

It has repeatedly been held that the scope of the bargaining unit controls the extent of the bargaining obligation, and that a union has no right to demand, over an employer's objection, a change in the unit. *See, e.g., Eastern Greyhound Lines* v. *NLRB,* 337 F.2d 84 (6th Cir. 1964); *Douds* v. *International Longshoremen's Association,* 241 F.2d 278 (2d Cir. 1957). This second condition, therefore, demands a resolution of the issue whether retirees are in the bargaining unit.

As was indicated above, the unit certified by the Board as appropriate was composed of "employees of the Employer's plant . . . working on hourly rates, including group leaders who work on hourly rates of pay . . . ." Retirees were not mentioned. Thus, the Board certified a bargaining unit composed only of presumably active employees "of the Employer's plant" and "working on hourly rates of pay."

In no prior case where the issue was raised did the Board hold that a retiree was in such a unit, or entitled to vote in an election. *See Taunton Supply Corporation,* 137 NLRB 221, 223 (1962); *Public Service Corporation of New Jersey,* 72 NLRB 224, 229-30 (1947); *J. S. Young Company,* 55 NLRB 1174 (1944); *W. D. Byron & Sons,* 55 NLRB 172, 174-75 (1944).

In *Public Service Corporation of New Jersey, supra,* 72 NLRB at 229-30, for example, the Board stated:

> "We have considerable doubt as to whether or not pensioners are employees within the meaning of Section 2(3) of the Act, since they no longer perform any

> work for the Employers, and have little expectancy of resuming their former employment. In any event, even if pensioners were to be considered employees, we believe that they lack a substantial community of interest with the employees who are presently in the active service of the Employers."

In *W. D. Byron & Sons, supra,* 55 NLRB *at* 174-75, the Company had a policy of laying off and pensioning employees who, due to advanced age, could not perform their work well, but the Company retained the right to recall them for light work when it became available. When the pensioners sought to be included in the bargaining unit, the Board stated:

> "None of the seven men laid off and pensioned in July 1943 has since been recalled to work, as no light work has been available at the tannery in this 6-month period. The Company does not know when suitable work will be available. Since it appears that the pensioners have little expectation of active employment at the tannery, we shall exclude them from the bargaining unit of regular production and maintenance workers."

See also, Denver-Colorado Spring-Pueblo Motor Way 129 NLRB 1184, 1185 (1961), where the Board held that employees are included in proposed units "only if they spend a 'major portion of their time' in tasks alike or similar to the ones of the other employees in the unit." The Board defined "major portion of their time" as 50 percent or more.

Yet, the Board holds in this case that retirees should be included in the bargaining unit for the purpose of renegotiating their retirement benefits because this subject "vitally affects" active bargaining unit employees. The Board indicates that active bargaining unit employees are affected in essentially three ways.

First, the Board states that "the Union and current employees have a legitimate interest in assuring that negotiated

retirement benefits are in fact paid and administered in accordance with the terms and intent of their contracts." We agree. Congress has provided a remedy, however, for breaches of contracts regarding retirement benefits, and, as we have pointed out below, n. 9, *supra* at p. 12, every breach of a collective bargaining contract is not, per se, an unfair labor practice. In any event, the issue in this case is not whether contract benefits can be legally enforced, but whether contract benefits for retirees must be re-opened at the request of the Union after the employees to whom these benefits are payable have retired.

Second, the Board indicates, and we agree, that active employees have a "selfish" interest about bargaining about retirement benefits, since these benefits are "an integral part of their total compensation." Leaving aside their altruistic sentiments, what active employees are concerned about are *their own* retirement benefits. It is not necessary to extend the bargaining obligation to persons already retired in order to insure current employees the right to negotiate through their bargaining representative their own retirement benefits to take effect after their retirement.

Third, the Board states that changes in retirement benefits for retired persons should be made mandatory subjects of collective bargaining because such changes "affect the availability of employer funds available for active employees." This, again, is of course true. However, does this mean that all employer salaries, including those to supervisory and managerial personnel, are mandatory subjects which must be collectively bargained with the Union? Moreover, all employer expenditures, from dividends to capital expenditures, affect, however obliquely, the availability of employer funds for active unit employees. Surely the Board does not contend that these are mandatory subjects of bargaining.

Congress decreed that the bargaining agent's authority extends only to bargaining for "all of the employees in a unit appropriate for such purposes." The appropriate bargaining

unit has economic incidents which the Board simply cannot modify by fiat or enlarge by sympathy.

We find that retired employees are not within the bargaining unit, and that under the plain meaning of the Act, employers have no statutory duty to re-negotiate with their unions improvements in retired employees' pension benefits.

IV.

Not only are the Board's arguments without support in the language of the Act, they are in defiance of its purpose. The purpose of federal labor legislation is to reconcile and, insofar as possible, equalize the power of competing economic forces within the society in order to encourage the making of voluntary agreements governing labor-management relations and prevent industrial strife. *See* Section 1, National Labor Relations Act, 29 U.S.C. § 151 (1964); Section 1, Labor-Management Relations Act, 1947, 29 U.S.C. § 141 (1964); *Consolidated Edison Company* v. *NLRB*, 305 U.S. 197, 221-22, 236 (1938); *National Labor Relations Board* v. *American National Insurance Company*, 343 U.S. 395, 401-403 (1952). Its purpose is not artificially to create or manufacture new economic forces. Thus, the Act "leaves the adjustment of industrial relations to the free play of economic forces but seeks to assure that the play of those forces be truly free." *Phelps Dodge Corporation* v. *NLRB*, 313 U.S. 177, 183 (1941).

Retired employees have no economic or bargaining power within this system. Their financial security derives from past economic power pragmatically and prudently exercised. Once retirement benefits have been bargained for, earned, and become payable, the employer may not recant on his contractual obligation to pay them. Section 301, Labor-Management Relations Act, 1947, 29 U.S.C. § 185(a) (1964). Nor may retirees demand that they be increased. Changing economic facts pertaining to the employer's business or the general economy occurring after an employee retires cannot enhance or depreciate the value of his prior services or justify

periodic post-retirement negotiations. The employer cannot retroactively increase his prices to compensate for these increased benefits, or fund expenses which are, as these would be, open-ended.

Moreover, retirees given the bargaining power would lose their economic security, for just as surely as an employer may increase benefits, in bargaining, he may take them away. Even if retirees were given the statutory power to periodically renegotiate pension benefits previously earned, the union would be an inappropriate bargaining vehicle. It is not at all unlikely that a union negotiator, presented with the opportunity to advance employees' wages at the expense of retirees' pensions, would choose to favor his constituents at the expense of the honorary union members, who retain no voting power.

We have studied with care the evidence in the *amicus curiae* briefs tending to show that the practice in industry is to bargain on retired employees' benefits. This voluntary practice demonstrates the increasingly humanitarian quality of the labor-management relationship, and is to be encouraged. However, it does not form a basis on which this Court can alter the statutory language, or undermine the Congressional intent.

V.

The Company's petition to review is granted, and the Labor Board's cross-application to enforce is denied.

ORDER OF THE COURT OF APPEALS.

(Filed June 10, 1970.)

No. 19,875.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

PITTSBURGH PLATE GLASS COMPANY,
CHEMICAL DIVISION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

LOCAL UNION NO. 1, ALLIED CHEMICAL AND
ALKALI WORKERS OF AMERICA,

Intervenor.

BEFORE: WEICK, CELEBREZZE and BROOKS, Circuit Judges.

On petition for review and cross-petition for enforcement of an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the petition to review is granted and the cross-petition to enforce is denied.

It is further ordered that Petitioner recover from Respondent the costs on appeal, as itemized below.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

[Filed July 31, 1970 Carl W. Reuss, clerk]

No. 19,875

United States Court of Appeals
for the Sixth Circuit

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT, AND LOCAL UNION NO. 1, ALLIED CHEMICAL AND ALKALI WORKERS OF AMERICA, INTERVENOR

Order

Before: WELCK, CELEBREZZE and BROOKS, Circuit Judges

Respondent's petition for rehearing having come on to be considered, and of the judges of this Court who are in regular active service only Judges Edwards and McCree having favored ordering consideration en banc,

IT IS ORDERED that the petition be, and it is hereby denied.

Entered by order of the court.

CARL W. REUSS,
Clerk.

Supreme Court of the United States

No. ——, October Term, 1970

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

PITTSBURGH PLATE GLASS CO., CHEMICAL DIVISION, ET AL.

Order Extending Time To File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 16, 1970.

POTTER STEWART,
Associate Justice of the Supreme Court of the United States.

Dated this 16th day of October, 1970.

Supreme Court of the United States

No. 910 ——, October Term, 1970

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1, PETITIONER

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL.

Order Allowing Certiorari, Filed February 22, 1971

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is consolidated with No. 961 and a total of one hour is allotted for oral argument.

Supreme Court of the United States

No. 961 ——, October Term, 1970

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL.

Order Allowing Certiorari, Filed February 22, 1971

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is consolidated with No. 910 and a total of one hour is allotted for oral argument.

U.S. GOVERNMENT PRINTING OFFICE: 1970 O—419-857

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SUPREME COURT, U.S.

In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 70-32

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1,

Petitioner,

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals For the Sixth Circuit.

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APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 19875.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

PITTSBURGH PLATE GLASS COMPANY,
CHEMICAL DIVISION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION to Review and Cross-Application to Enforce an Order of the National Labor Relations Board.

Decided and Filed June 10, 1970.

Before: WEICK, CELEBREZZE, and BROOKS, Circuit Judges.

CELEBREZZE, Circuit Judge. This cause is before the Court on the petition of the Pittsburgh Plate Glass Company, Chemical Division, [hereinafter "the Company"] to review, and upon the National Labor Relations Board's cross-application to enforce a Labor Board order[1] requiring the Company to cease and desist from refusing to bargain collectively with the Union about changing health insurance benefits for previously retired employees, who prior to their retirement, had been actively working for the

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[1] The Board's Decision and Order are reported at 177 NLRB No. 114 (1969).

Company in the collective bargaining unit represented by the Union, and who, upon their retirement, became covered by a Union-negotiated retirement benefit plan. The Board found that by proposing improvements in their retirement health plans to retirees individually, rather than bargaining such alterations collectively with the Union, the Company "unilaterally modified" the retirement benefits in violation of Section 8(a)(5) and (1) of the Labor-Management Relations Act, 1947, as amended, 29 U.S.C. § 158(a)(5) & (1) (1964). Local Union No. 1, Allied Chemical and Alkali Workers of America ["the Union"], which filed the charges initiating these proceedings, has intervened herein, and several other interested parties have filed briefs *amici curiae*.[2] This Court has jurisdiction under Section 10(e) and (f) of the Act.

The facts, which are essentially undisputed, raise a question of first impression, so far as we are able to determine, before this or any other Court under the National Labor Relations Act, as amended.

I.

Since 1949, the Union has been the exclusive bargaining representative for Company employees in a unit composed of:

> "All employees of the Employer's plant and limestone mine at Barberton, Ohio working on hourly rates, including group leaders who work on hourly rates of pay, but excluding salaried employees and supervisors within the meaning of the Act."

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[2] Briefs urging enforcement of the Board's order were filed by the American Federation of Labor and Congress of Industrial Organizations; the Amalgamated Transit Union, AFL-CIO; the International Union, UAW; and the United Steelworkers of America, AFL-CIO. Briefs urging that the Board's order be set aside were filed by the Union Carbide Corporation, the National Association of Manufacturers of the United States of America; and the Chamber of Commerce of the United States of America.

In 1950, the Union and the Company negotiated provisions for an employee group health insurance plan. An oral agreement was made that retired employees could also participate in the plan by paying a stipulated premium, which would be deducted from their pension benefits. The Company made no contribution toward retired employees' health insurance premiums under this program. Except for an improvement unilaterally instituted by the Company in 1954 and another improvement negotiated in 1959, this program remained unchanged in all relevant respects until 1962.

In 1962, the parties entered into a memorandum agreement by which the Company agreed to contribute $2.00 per month toward the cost of the monthly premium for medical benefits, but only for persons who retired from the Company's employ after June 27, 1962. Persons already retired prior to that date received no such contribution. In these negotiations the parties also agreed to make age 65 the mandatory retirement age.

During negotiations for a new labor contract in 1964, the parties again bargained about insurance benefits for retired employees. The Company agreed to increase its contribution to medical benefits for persons retired after June 27, 1962 from $2.00 per month to $4.00 per month. However, anticipating the enactment of Medicare legislation, the agreement provided that if a government health program were enacted, the Company could reduce its contribution by the amount of the 1964 increase, *i.e.*, $2.00 per month.

On November 23, 1965, following the enactment of Medicare and during the term of their outstanding collective bargaining agreement, the Union asked the Company to engage in mid-term bargaining for the purpose of renegotiating insurance benefits for retired employees of a type not available under Medicare. The Company took the

Union's request under advisement and responded at a meeting held on March 21, 1966. First, the Company announced its intention to reclaim its contribution of the extra $2.00 per month beginning July 1, 1966, the effective date of Medicare. The Company's right to do this under the 1964 contract is not in dispute. Second, the Company said it intended to cancel the negotiated health insurance plan for retired employees because, in its opinion, the enactment of Medicare made this insurance useless, and to substitute therefor a $3.00 monthly contribution for supplemental Medicare benefits for each employee who retired after July 27, 1962. Third, the Company rejected the Union's request to bargain for a supplemental insurance plan, and challenged the Union's right to bargain for retired employees at all.

The Union conceded the Company's contract right to reduce its contribution, but challenged the Company's right to unilaterally substitute supplemental Medicare for the negotiated health program.

Two days later, on March 23, 1966, the Company told the Union that, having reconsidered its position, the Company would not unilaterally substitute Medicare for the negotiated health insurance. Instead, the Company said it intended to mail letters to retired employees announcing that they could choose to withdraw individually from the negotiated health insurance plan and, in lieu thereof, the Company would contribute $3.00 per month towards supplemental Medicare premiums.

The Union objected to this proposed action, asserting the right to bargain about any change in the contract affecting the health insurance plan. Nevertheless, the Company refused to bargain with the Union, and, on March 24, 1966, mailed the aforementioned letters to retired employees with the result that 15 out of 190 retirees elected the $3.00 contribution to Medicare instead

of the negotiated $2.00 contribution to the private health insurance program.[3] In response to the Company's action, the Union filed the instant charges.

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[3] That letter which forms the basis of this controversy, provided:

Dear Pensioner:

The matter of your Hospital-Medical Insurance is of the utmost importance to you; therefore, we recommend that you read this letter carefully.

The program of Hospital and Medical benefits under the Federal Social Security Act, known as Medicare will become effective on July 1, 1966. Any person who has attained age 65, whether they ever worked and were covered by Social Security or not will be eligible to receive benefits under this program.

Hospital Benefits under Medicare will be received automatically by any person 65 years of age or over; no enrollment or payment of premiums is required. However, *Medical Benefits* are voluntary and do require enrollment and the payment of a premium of $3.00 a month per person. Enrollment for Medical Benefits must be completed by March 31, 1966, otherwise, enrollment will be delayed to a future date and benefits will be lost.

You are urged to enroll for the Medical benefits available to you as soon as you become eligible since at present you are under 65 years of age. If you have any questions concerning the program, contact your nearest Social Security office when appropriate to do so.

As a pensioner who at present is under age 65, you have been enrolled in a program of Hospitalization-Medical Insurance, as furnished by the Equitable Life Assurance Society, your participation in this program of Insurance for either single coverage or for coverage for you and your spouse has been a voluntary election on your part, and enrollment has been conditioned on your timely payment of the full monthly premium for the type coverage you elected to carry.

It is necessary to inform you at this time, that in your case, the program of Insurance provides that the current Company monthly contribution of $4.00 will be reduced to a $2.00 monthly contribution when Social Security Hospital-Medical benefits program goes into effect in July 1966. This is in accordance with prior arrangements on this matter. However, this reduction will not take place until the month following the month in which you become age 65 or are eligible for Social Security Hospital-Medical benefits.

Should you elect to continue your present coverage *after you become age 65* and are eligible for the Social Security

(Continued on following page)

The Board's Trial Examiner conducted hearings into the complaint, found the foregoing to be the facts, and concluded that pensioners and retirees are not employees as defined by Section 2(3) of the Act, are not employees

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(*Continued from preceding page*)

Hospital-Medical Program, the same benefits as outlined in the Certificate of Insurance will continue. We must remind you, however, in considering continuance of your present program of Hospitalization and Medical Insurance that, with respect to this plan there will be no duplication of benefits that are also paid for under the Medicare program.

The Company would like also to inform you that upon your reaching age 65, should you elect to voluntarily discontinue your enrollment in the present Hospitalization Medical program of insurance then your monthly premiums would no longer be deducted from your pension check, and the full amount will be available to you following your withdrawal from the plan.

In the event you do elect to discontinue your present enrollment, after you reach age 65, the Company will then make a contribution of three dollars ($3.00) per month to you, which amount would cover the current individual cost to you for your Social Security enrollment.

If after you reach age 65 and elect to discontinue your present enrollment, but your spouse is under age 65, and not yet eligible for the Social Security Hospital-Medical program you may elect to continue her in the present program of Insurance as currently furnished by the Equitable Life Assurance Society, until she reaches age 65 or becomes eligible for the Social Security Hospital-Medical Program. In order to enroll her in this manner you must notify the Company and timely pay the full cost of the premium for single coverage for your spouse. The initial cost of this coverage will be $5.71 per month effective July 1, 1966.

If you have any questions concerning this matter, you may contact Mr. Frank Ruehling in the Insurance Department at the Barberton Plant.

Yours very truly,

W. R. Harris

W. R. Harris

The above-quoted letter was mailed to retirees under age 65 carrying insurance to which the Company made a contribution. Other letters, explaining retirees' rights under Medicare, the negotiated retirement health plans, and the proposed supplemental Medicare contributions, were mailed to: retirees having no insurance coverage; retirees carrying plans of insurance to which the Company made no contribution; retirees carrying insurance to which the Company contributed; and retirees under age 65 carrying insurance to which the Company made no contribution.

within the meaning of Section 8(a)(5), and are not within the bargaining unit; that a Company has no statutory duty to re-negotiate benefits for previously retired employees; that the letter from the Company to the retirees did not constitute a "unilateral change" of any provisions of the negotiated contract or a mid-term change within the intendment of section 8(d). He did not find that the Company's action had the purpose or effect of undermining employees' section 7 rights. Finding violations of neither section 8(a)(5) nor section 8(a)(1), the Examiner recommended dismissal of the complaint.

The Board adopted the Examiner's findings of fact, but disagreed with his construction of the Act. The Board held: that retired employees are "employees" within the meaning of the statute for the purposes of bargaining about changes in their retirement benefits; that, in the alternative, renegotiating retirement benefits for retirees is within the contemplation of the statute because it "vitally affects active bargaining unit employees"; that the Company had "unilaterally changed" retirees' health benefits in violation of Section 8(a)(1) and (5) of the Act.[4] Accordingly, the Board ordered the Company to cease and desist from refusing to bargain collectively with the Union about adjustments in health insurance plans for retired employees, and otherwise "interfering with, restraining, or coercing employees in the exercise of" their section 7 rights. In addition, the Board ordered the Company to rescind any "unilaterally instituted" adjustment in retirees' health benefits upon request of the Union.

The sole issue in this case is whether an employer may bargain individually with retired employees about alterations in their negotiated retirement benefits, or

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[4] Board Member Zagoria dissented from the Board's Decision and Order.

whether alterations in retirees' retirement benefits are mandatory subjects of bargaining with respect to which an employer must bargain collectively at the request of the Union.

The Labor-Management Relations Act enjoins employers to bargain collectively [5] and in good faith with the bargaining agents of their employees[6] about "wages, hours, and other terms and conditions of employment." [7] It is well established, and not in dispute here, that pensions and insurance benefits to be enjoyed by employees after retirement are "wages" for the purposes of the statute, albeit deferred ones, and that insofar as they accompany a provision specifying a mandatory retirement age, as is present in this case, they are also "conditions of employment." *W. W. Cross & Company,* 77 NLRB 1162 (1948), enf'd, *W. W. Cross & Company v. NLRB,* 174 F.2d 875

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[5] Section 8(a)(5), Labor-Management Relations Act, 29 U.S.C. § 158(a)(5) (1964) provides:

> "(a) It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

[6] Section 9(a), Labor-Management Relations Act, 29 U.S.C. § 159(a) (1964) provides the statutory method for selection of a bargaining agent:

> "(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. * * *".

[7] Section 8(d), Labor-Management Relations Act, 29 U.S.C. § 158(d) (1964) defines the collective bargaining obligation as:

> "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable time and confer in good faith with respect to wages, hours, and other terms and conditions of employment. * * *"

(1st Cir. 1949); *Inland Steel Company*, 77 NLRB 1 (1948), enf'd, *Inland Steel Company v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied on this issue*, 336 U.S. 960; *National Labor Relations Board v. Black-Clawson Company*, 210 F.2d 523 (6th Cir. 1954). Being mandatory, as opposed to permissive, subjects of bargaining, if a company refuses to bargain about active employees' retirement benefits when the employees' bargaining representative requests the opportunity to do so, it violates not only section 8(a)(5), but also section 8(a)(1), which prohibits employers from interfering with, restraining, or coercing employees in their section 7 right "to bargain collectively through representatives of their own choosing." [8] Furthermore, being mandatory, the matter can be pressed by either party to an impasse, or be used, under appropriate circumstances, to block an agreement or justify a strike or lockout. *See, e.g., National Labor Relations Board v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958).

However, the issue in this case is not whether retirement benefits for *active* employees are mandatory subjects of collective bargaining. The issue is, once retirement benefits have been negotiated for active employees who have retired and begun collecting benefits, whether an employer may propose improvements in benefits to the retirees individually, or whether retirees are "employees"

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[8] Section 8(a)(1) makes it an unfair labor practice for an employer

> "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158 (a)(1) (1964).

Section 7 of the Act, 29 U.S.C. § 157 (1964), provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. * * *"

under section 8(a)(5), changes in whose benefits must be collectively bargained with the union.[9] We find that retirees are not "employees" within the meaning of section 8(a)(5) and that the Company was under no constraint to collectively bargain improvements in their benefits with the Union.

II.

The Board found that persons who have retired from the service of an employer may be considered "employees" with respect to whom the employer must bargain collectively because, as a general proposition, coverage of the Act is not limited to persons currently in the employ of a particular employer. It is true that for many purposes the

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[9] This is not the case of an employer unilaterally abrogating contractually vested retirement benefits of retirees, as it might have been had the Company unilaterally substituted contributions to supplementary Medicare plans for the negotiated health plans, as it originally planned to do. In that event, the retirees would have had an appropriate remedy, either by invoking the grievance procedure of the contract under which they received the benefits, or by bringing an action under Section 301 of the Labor-Management Relations Act, 1947, 29 U.S.C. § 185(a) (1964). *See United Steelwo..ers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). Even then, however, the Company's conduct would not rise to the level of an unfair labor practice in the absence of a showing of bad faith in arbitration or a reasonable tendency of undermining the union as the bargaining agent for active employees. *See Sinclair Refining Co. v. NLRB*, 306 F.2d 569 (5th Cir. 1962); *Independent Petroleum Workers of New Jersey v. Esso Standard Oil Co.*, 235 F.2d 401 (2d Cir. 1956); *National Labor Relations Board v. Pennwoven; Inc.*, 194 F.2d 521 (3d Cir. 1952).

Nor is this case to be confused with those holding it an unfair labor practice under section 8(a)(5) for an employer to short-circuit the collective bargaining process by bypassing the union and bargaining directly with *active* employees or instituting changes unilaterally during the bargaining process. *See, e.g., National Labor Relations Board v. Katz*, 369 U.S. 736 (1962).

Moreover, we do not decide the extent to which a company violates the Act by making deceptive offers to retirees, the effect of which may be to defraud them into accepting reduced retirement benefits.

Act extends protection to persons not currently serving employers. However, by plain meaning an employer has no statutory duty to bargain collectively with respect to persons who are not "his employees."

Section 2(3) of the Labor-Management Relations Act, 1947, 29 U.S.C. § 152(3) (1964), provides:

> "When used in this subchapter—
>
> * * * * *
>
> "(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, *unless this subchapter explicitly states otherwise,* and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * * [Emphasis added]."

As the Supreme Court indicated in *Phelps Dodge Corporation v. NLRB,* 313 U.S. 177 (1941), the purpose of this broad definition, which was borrowed almost wholly from the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1964), was to insure against interpretations, such as had at one time been made under the Clayton Act, that persons not employed by a particular employer were prohibited from peaceful picketing to publicize a dispute because they did not stand in the proximate relationship of employees to the employers involved. *Id.* at 191-92. In addition, it was intended to dispel any notions that labor unions had to limit the extent of their organizations to employees of a single employer. In twice emphasizing the statutory language italicized above, the Supreme Court made plain its belief that the expansive definition of "employee" in section 2(3) was to give way where "the Act explicitly states otherwise." As a particular example, the Court stated:

> "In determining whether an employer has refused to bargain collectively with the representatives of 'his employees' in violation of § 8(5) [now section 8(a)(5)] and § 9(a) it is of course essential to determine who constitute 'his employees.' One aspect of this is covered by § 9(b) which provides for the determination of the appropriate bargaining unit." *Phelps Dodge Corp. v. NLRB, supra,* at 912.

There was nothing strained or unnatural in this interpretation. The statute itself plainly provides that it shall be an unfair labor practice for an employer

> "to refuse to bargain collectively with the representatives of *his employees,* subject to the provisions of section 9(a)."

This construction is, of course, unaffected by those cases on which the Board relies heavily, making it an unfair labor practice under Section 8(a)(3) of the Act for an employer to discriminate in the hiring of applicants for employment, who were not in the company's employ,[10] registrants at hiring halls,[11] employees of a company taken over by a "successor employer," [12] employees who have quit,[13] and other persons not currently employed and outside the bargaining unit. Section 8(a)(3) forbids "discrimination in regard to hire or tenure." If prospective employees or those whose employment has ceased because of illegal discrimination were not regarded as within its

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[10] *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177 (1941). *Accord, NLRB v. Louisville Chair Co.,* 385 F.2d 922, 925 (6th Cir. 1967), *cert. denied,* 390 U.S. 1013.

[11] *Local 872, International Longshoremen's Association,* 163 NLRB 586 (1967); *Local 1351, Steamship Clerks etc. v. NLRB,* 329 F.2d 259 (D.C. Cir. 1964), *cert. denied,* 377 U.S. 993.

[12] *Chemrock Corp.,* 151 NLRB 1074 (1965). *Chemrock* deals with facts and issues entirely different from those present here, however to the extent of any apparent inconsistency, we decline to follow it.

[13] *Goodman Lumber Co.,* 166 NLRB No. 48 (1967).

terms, a refusal to hire for unlawful reasons, and unlawful discharge, could never be unfair labor practices under this section.

The Board itself has recognized this distinction between the use of the word in section 8(a)(3) and (5):

> "We do not regard as controlling for purposes of determining for whom an employer must bargain those cases cited * * * which hold that the antidiscrimination provisions of Section 8(a)(3), (4) and (b)(2) of the Act forbid discrimination against applicants for employment. The antidiscrimination provisions refer to 'employees' *generally*, whereas unlike these provisions, Section 8(a)(5) contains specific language requiring an employer to bargain for *'his' employees.* [Emphasis in original]" *Page Aircraft Maintenance, Inc.*, 123 NLRB 159, 163 (1959).

We are similarly unpersuaded by the analogy made by the Board between the word "employee" as that word has been construed for the purposes of Section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186 (1964), *see, e.g., Blassie v. Kroger*, 345 F.2d 58, 68-71 (8th Cir. 1965), and the word "employee" as it appears in section 8(a)(5). Section 302 is a criminal provision, making it a misdemeanor for an employer to make payments to a union representing his employees. Section 302(c), under which *Blassie, supra,* was decided, exempts from the operation of the section employer contributions to, *inter alia,* employee trust funds, among which are pension and retirement plans. Not to regard retirees as employees for the purposes of that section would frustrate the purpose of retirement trusts, which have been designated as mandatory subjects of bargaining, by making distributions to retirees from them illegal. The Board's argument that it is an "anomaly" to treat the word differently under the two sections is itself an anomaly.

We also reject the Board's argument that the interpretation of the word "employee" by the Internal Revenue Service under Sections 401(a) and 501(c)(9) of the Internal Revenue Code of 1954, 26 U.S.C. §§ 401(a) & 501(c)(9) (1964), is dispositive of the issues in this case. *See* 26 CFR § 1.401, *as revised,* Jan. 1, 1969.

We find that the general definition of "employees" in section 2(3) is superseded by the explicit statement in section 8(a)(5), and that an employer has a duty to bargain collectively only with the representatives of *his employees.*

We now turn to the issue whether retired employees are employees of the Company for the purposes of section 8(a)(5).[14] Upon this issue the record is clear. Retirement with this Company, as with most other companies, is a complete and final severance of employment. Upon retirement, employees are completely removed from the payroll and seniority lists, and thereafter they perform no services for the employer, are paid no wages, are under no restrictions as to other employment or activities, and have no rights or expectations of re-employment. For these reasons, as will be discussed below, the Board has consistently held that retired employees have no right to vote in representation elections, even when the employer has a right, and they have some expectation, of being recalled to work. *W. D. Byron & Sons,* 55 NLRB 172, 174-75 (1944).

The fact that retired persons may continue to receive

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[14] Although the Board's interpretation of the term "employee" is entitled to some weight, *Local No. 207, International Association of Bridge Workers v. Perko,* 373 U.S. 701, 706 (1963); *National Labor Relations Board v. Hearst Publications, Inc.,* 322 U.S. 111, 130 (1944), the Board made no finding in this case that retirees are employees within the meaning of the Act. In prior cases, however, the Board has expressly found that retirees are not employees for the purposes of the more expansive section 2(3). *See, e.g., Public Service Corporation of New Jersey,* 72 NLRB 224, 229-30 (1947).

pensions after permanently leaving the service of an employer does not entitle them to continued status as employees. Indeed, the receipt by them of retirement benefits further emphasizes the finality of their employment severance.

We find that persons who have retired from the service of an employer are no longer "his employees."

III.

In addition to limiting the employer's bargaining obligation to "his employees," section 8(a)(5) conditions the bargaining obligation on the provisions of section 9(a), which provides:

> "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for purposes of collective bargaining * * *"

It has repeatedly been held that the scope of the bargaining unit controls the extent of the bargaining obligation, and that a union has no right to demand, over an employer's objection, a change in the unit. *See, e.g., Eastern Greyhound Lines v. NLRB*, 337 F.2d 84 (6th Cir. 1964); *Douds v. International Longshoremen's Association*, 241 F.2d 278 (2d Cir. 1957). This second condition, therefore, demands a resolution of the issue whether retirees are in the bargaining unit.

As was indicated above, the unit certified by the Board as appropriate was composed of "employees of the Employer's plant * * * working on hourly rates, including group leaders who work on hourly rates of pay. * * *" Retirees were not mentioned. Thus, the Board certified a bargaining unit composed only of presumably active

Jersey, 72 NLRB 224, 229-30 (1947); *J. S. Young Company*, 55 NLRB 1174 (1944); *W. D. Byron & Sons*, 55 NLRB 172, 174-75 (1944).

In *Public Service Corporation of New Jersey, supra*, 72 NLRB at 229-30, for example, the Board stated:

> "We have considerable doubt as to whether or not pensioners are employees within the meaning of Section 2(3) of the Act, since they no longer perform any work for the Employers, and have little expectancy of resuming their former employment. In any event, even if pensioners were to be considered employees, we believe that they lack a substantial community of interest with the employees who are presently in the active service of the Employers."

In *W. D. Byron & Sons, supra*, 55 NLRB at 174-75, the Company had a policy of laying off and pensioning employees who, due to advanced age, could not perform their work well, but the Company retained the right to recall them for light work when it became available. When the pensioners sought to be included in the bargaining unit, the Board stated:

> "None of the seven men laid off and pensioned in July 1943 has since been recalled to work, as no light work has been available at the tannery in this 6-month period. The Company does not know when suitable work will be available. Since it appears that the pensioners have little expectation of active employment at the tannery, we shall exclude them from the bargaining unit of regular production and maintenance workers."

See also, Denver-Colorado Spring-Pueblo Motor Way, 129 NLRB 1184, 1185 (1961), where the Board held that employees are included in proposed units "only if they spend a 'major portion of their time' in tasks alike or similar to the ones of the other employees in the unit." The Board defined "major portion of their time" as 50 percent or more.

Yet, the Board holds in this case that retirees should be included in the bargaining unit for the purpose of renegotiating their retirement benefits because this subject "vitally affects" active bargaining unit employees. The Board indicates that active bargaining unit employees are affected in essentially three ways.

First, the Board states that "the Union and current employees have a legitimate interest in assuring that negotiated retirement benefits are in fact paid and administered in accordance with the terms and intent of their contracts." We agree. Congress has provided a remedy, however, for breaches of contracts regarding retirement benefits, and, as we have pointed out below, n. 9, *supra* at p. [10], every breach of a collective bargaining contract is not, per se, an unfair labor practice. In any event, the issue in this case is not whether contract benefits can be legally enforced, but whether contract benefits for retirees must be re-opened at the request of the Union after the employees to whom these benefits are payable have retired.

Second, the Board indicates, and we agree, that active employees have a "selfish" interest about bargaining about retirement benefits, since these benefits are "an integral part of their total compensation." Leaving aside their altruistic sentiments, what active employees are concerned about are *their own* retirement benefits. It is not necessary to extend the bargaining obligation to persons al-

ready retired in order to insure current employees the right to negotiate through their bargaining representative their own retirement benefits to take effect after their retirement.

Third, the Board states that changes in retirement benefits for retired persons should be made mandatory subjects of collective bargaining because such changes "affect the availability of employer funds available for active employees." This, again, is of course true. However, does this mean that all employer salaries, including those to supervisory and managerial personnel, are mandatory subjects which must be collectively bargained with the Union? Moreover, all employer expenditures, from dividends to capital expenditures, affect, however obliquely, the availability of employer funds for active unit employees. Surely the Board does not contend that these are mandatory subjects of bargaining.

Congress decreed that the bargaining agent's authority extends only to bargaining for "all of the employees in a unit appropriate for such purposes." The appropriate bargaining unit has economic incidents which the Board simply cannot modify by fiat or enlarge by sympathy.

We find that retired employees are not within the bargaining unit, and that under the plain meaning of the Act, employers have no statutory duty to re-negotiate with their unions improvements in retired employees' pension benefits.

IV.

Not only are the Board's arguments without support in the language of the Act, they are in defiance of its purpose. The purpose of federal labor legislation is to reconcile and, insofar as possible, equalize the power of competing economic forces within the society in order to en-

courage the making of voluntary agreements governing labor-management relations and prevent industrial strife. *See* Section 1, National Labor Relations Act, 29 U.S.C. § 151 (1964); Section 1, Labor-Management Relations Act, 1947, 29 U.S.C. § 141 (1964); *Consolidated Edison Company v. NLRB*, 305 U.S. 197, 221-22, 236 (1938); *National Labor Relations Board v. American National Insurance Company*, 343 U.S. 395, 401-403 (1952). Its purpose is not artificially to create or manufacture new economic forces. Thus, the Act "leaves the adjustment of industrial relations to the free play of economic forces but seeks to assure that the play of those forces be truly free." *Phelps Dodge Corporation v. NLRB*, 313 U.S. 177, 183 (1941).

Retired employees have no economic or bargaining power within this system. Their financial security derives from past economic power pragmatically and prudently exercised. Once retirement benefits have been bargained for, earned, and become payable, the employer may not recant on his contractual obligation to pay them. Section 301, Labor-Management Relations Act, 1947, 29 U.S.C. § 185(a) (1964). Nor may retirees demand that they be increased. Changing economic facts pertaining to the employer's business or the general economy occurring after an employee retires cannot enhance or depreciate the value of his prior services or justify periodic post-retirement negotiations. The employer cannot retroactively increase his prices to compensate for these increased benefits, or fund expenses which are, as these would be, open-ended.

Moreover, retirees given the bargaining power would lose their economic security, for just as surely as an employer may increase benefits, in bargaining, he may take them away. Even if retirees were given the statutory

power to periodically renegotiate pension benefits previously earned, the union would be an inappropriate bargaining vehicle. It is not at all unlikely that a union negotiator presented with the opportunity to advance employees' wages at the expense of retirees' pensions, would choose to favor his constituents at the expense of the honorary union members, who retain no voting power.

We have studied with care the evidence in the *amicus curiae* briefs tending to show that the practice in industry is to bargain on retired employees' benefits. This voluntary practice demonstrates the increasingly humanitarian quality of the labor-management relationship, and is to be encouraged. However, it does not form a basis on which this Court can alter the statutory language, or undermine the Congressional intent.

V.

The Company's petition to review is granted, and the Labor Board's cross-application to enforce is denied.

APPENDIX B.

ORDER OF THE COURT OF APPEALS.

(Filed June 10, 1970.)

No. 19,875.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

LOCAL UNION NO. 1, ALLIED CHEMICAL AND ALKALI WORKERS OF AMERICA,

Intervenor.

BEFORE: WEICK, CELEBREZZE and BROOKS, Circuit Judges.

On petition for review and cross-petition for enforcement of an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the petition to review is granted and the cross-petition to enforce is denied.

It is further ordered that Petitioner recover from Respondent the costs on appeal, as itemized below.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX C.

ORDER OF THE COURT OF APPEALS DENYING REHEARING.

(Filed July 31, 1970.)

(Caption as on preceding page.)

Before: WEICK, CELEBREZZE and BROOKS, Circuit Judges.

Respondent's petition for rehearing having come on to be considered, and of the judges of this Court who are in regular active service only Judges Edwards and McCree having favored ordering consideration en banc.

IT IS ORDERED that the petition be, and it is hereby denied.

ENTERED BY ORDER OF THE COURT,
CARL W. REUSS,
Clerk.

APPENDIX D.

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

(Dated July 9, 1969.)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 8-CA-4202

PITTSBURGH PLATE GLASS COMPANY,
CHEMICAL DIVISION

and

LOCAL UNION NO. 1, ALLIED CHEMICAL
AND ALKALI WORKERS OF AMERICA.

DECISION AND ORDER.

The complaint in this proceeding alleges that Respondent (the Employer) violated Section 8(a)(1) and (5) of the National Labor Relations Act by unilaterally modifying a negotiated hospitalization and surgical insurance plan for retired employees which was part of an outstanding collective-bargaining agreement between Respondent and the Charging Party (the Union).

On April 14, 1967, Trial Examiner James V. Constantine issued a Decision finding that Respondent's conduct did not transgress the Act and recommending that the complaint be dismissed. The General Counsel, the Respondent, and the Charging Party filed exceptions and supporting briefs.[1]

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[1] The Respondent's and the Charging Party's requests for oral argument are hereby denied because the record, including the exceptions and briefs, adequately presents all of the issues.

The Board has reviewed the Trial Examiner's rulings made at the hearing and finds that no prejudicial error was committed.[2] Those rulings are affirmed. The Board has also considered the Trial Examiner's Decision, the exceptions and briefs of the parties, the briefs of the amici curiae,[3] and the entire record. We hereby adopt the Trial Examiner's findings and conclusions only to the extent that they are consistent with this Decision.

I. The Union has represented employees in an appropriate unit at Respondent's Barberton, Ohio, plant since 1949. In 1950 the parties negotiated a contract which included provisions for a pension and a hospitalization and surgical insurance plan. They also reached an oral understanding that retired employees could elect to participate in the insurance plan by contributing the total cost of insurance premiums which would be deducted from their pension payments. Doubtless this was a meaningful benefit because it enabled retired employees to enjoy health insurance protection at the group rate. Except for a unilateral improvement made by Respondent in 1954, this oral understanding was effectuated without change for 9 years.

In 1959 the parties negotiated an improvement in the insurance plan for retired employees by increasing the maximum amount of daily hospitalization benefits. The

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[2] The Trial Examiner inadvertently stated in his Decision that the hearing was held in Mansfield, Ohio. In fact it was held in Akron, Ohio.

[3] *Amicus curiae* briefs were filed urging approval of the Trial Examiner's Decision by the Chamber of Commerce of the United States and the National Association of Manufacturers. Briefs urging reversal of the Trial Examiner's Decision were filed by the American Federation of Labor and Congress of Industrial Organizations, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, the United Steelworkers of America, AFL-CIO, and the Amalgamated Transit Union, AFL-CIO.

parties also reduced to writing their understanding respecting the participation rights of retired employees.[4]

During contract negotiations in 1962, the insurance plan was improved when Respondent agreed to contribute $2 per month towards the cost of insurance premiums for employees who retired after June 27, 1962, and who elected to participate in the plan. In these negotiations the parties also agreed to make age 65 the mandatory retirement age.

In their negotiations for a new labor contract in 1964, the parties again bargained about insurance benefits for retired employees. The Respondent agreed to increase its monthly contribution for each participating retired employee from $2 to $4 per month. However, anticipating Congress' enactment of Medicare legislation, the parties agreed that upon that occurrence the Respondent could reduce its contribution by the amount of the 1964 increase (i.e., $2 per month).

On November 23, 1965, following the enactment of Medicare and during the term of their outstanding collective-bargaining agreement, the Union asked the Respondent to engage in mid-term bargaining for the purpose of negotiating insurance benefits for retired employees of a type not available under Medicare. Respondent's industrial relations director, Rogers, took the request under advisement. Several months went by without any response. Then in March 1966, the Union reminded Respondent of the earlier request for mid-term bargaining.

At a meeting held on March 21, 1966, Respondent gave its answer. First, Respondent said that it intended,

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[4] In these 1959 negotiations Respondent apparently challenged the right of the Union to bargain about such benefits for retired employees. Nonetheless, Respondent did bargain with the Union about this subject in 1959 and in subsequent contract negotiations.

because of the intervening passage of Medicare, to reclaim its contribution of the extra $2 per month for retired employees under the terms of the 1964 contract beginning July 1, 1966, the effective date of Medicare. Second, Respondent said that it intended to cancel the negotiated health insurance plan for retired employees because, in Respondent's opinion, the enactment of Medicare made this insurance useless. (Respondent also contended that a nonduplication of benefits provision in the insurance plan precluded payment under the negotiated health insurance plan of those benefits which were also provided by Medicare.[5]) Third, Respondent announced that it had decided to contribute $3 a month for each retired employee to be applied towards the cost of subscribing to supplemental Medicare coverage. Fourth, Respondent rejected the Union's request to bargain for a supplementary insurance plan and challenged the Union's right to bargain for retired employees at all.

The Union conceded Respondent's contract right to reduce its contribution, but challenged Respondent's right unilaterally to abrogate the provisions of the contract entitling retired employees to participate in the health insurance plan and requiring the Respondent to contribute a minimum of $2 per month for this purpose.

Two days later, on March 23, 1966, Respondent told the Union that, having reconsidered its position, Respondent would leave the health insurance plan for retired employees "intact." Instead, Respondent said that it intended to send letters to retired employees announcing that they could choose to withdraw individually from the negotiated health insurance plan and, in lieu thereof, that

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[5] The Charging Party challenges the correctness of this interpretation of the insurance plan. But it is unnecessary to, and we do not, reach this question.

Respondent would contribute $3 per month towards supplemental Medicare premiums. The Union objected to this proposed action, asserting the right to bargain about any change in the contract concerning the health insurance plan. The Respondent again refused to bargain with the Union for a supplementary insurance plan.

The next day, March 24, Respondent sent the aforementioned letters to retired employees with the result that approximately 15 of 190 canceled their participation in the negotiated health insurance plan. In response to the Respondent's actions, the Union filed the instant charges.

In October 1966, Respondent proposed that the termination date of the existing labor agreement be extended from October 20, 1967, to October 19, 1970. Included in that proposal was a clause reiterating Respondent's position taken in March 1966, which the Union rejected.

II. The Trial Examiner found the aforementioned facts, which are not in controversy. He then recommended dismissal of the complaint for the reason that, in his opinion, retired employees are not embraced by the policies of the statute nor by its definition of "employee," [6] and, therefore, that the Respondent was under no statutory duty to refrain from unilateral action with respect to retired employees. While acknowledging that pensions and health insurance benefits are statutory subjects of bargaining, he concluded, nonetheless, that the obligation which Congress has laid on employers and unions to bar-

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[6] Section 2 (3). "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. * * *"

gain about these subjects abruptly ends on the date that employees retire from active employment.

In one significant respect, the Trial Examiner's findings are not clear to us. He found at the outset of his Decision that Respondent had "refused to meet and confer with the Union regarding changes unilaterally * * * made by Respondent," [7] yet he concluded his Decision with the finding that these unilateral changes did not modify the collective-bargaining contract "since employees [meaning retired employees] were free to decline" [8] the Employer's offer which constituted the unilateral change.

We disagree both with his interpretation of the statute and with his conclusion that Respondent's unilateral change in the insurance plan for retired employees was not a modification of the subsisting collective-bargaining agreement. From our study of the Labor Act, its policies, its legislative and decisional history, we conclude: First, that retired employees are "employees" within the meaning of the statute for the purposes of bargaining about changes in their retirement benefits; second, that bargaining about changes in retirement benefits for retired employees is in any event within the contemplation of the statute because of the interest which active employees have in this subject; and, third, that bargaining about such benefits is fully consonant with the statutory requirement that "wages, hours, and other terms and conditions of employment" be subject to the institution of collective bargaining envisioned by the Act.

III. The statutory question raised here is an important one because of its obvious significance to ever-increasing numbers of retired workers and their dependents. It

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[7] Trial Examiner's Decision 196-67, p. 5.

[8] Trial Examiner's Decision 196-67, p. 9.

is no less important to current employees. That it arises for the first time more than 30 years after the initial passage of the Labor Act underscores emerging patterns in collective bargaining which have resulted in earlier retirement for employees on terms which include both retirement income and protections against the health hazards of advancing age.[9] At the same time the life expectancy for Americans is greater than ever before [10] which, in turn, increases their reliance on retirement benefits.

It has long been settled that the statute enjoins employers and unions to bargain in good faith about pensions and health insurance benefits to be enjoyed by employees upon their retirement. *W. W. Cross & Co.*, 77 NLRB 1162, 1163-1164, enfd. 174 F.2d 875, 877-878 (C.A. 1); *Inland Steel Company*, 77 NLRB 1, enfd. 170 F.2d 247 (C.A. 7), cert. denied 336 U.S. 960. It is equally settled that unilateral changes in negotiated pension and insurance plans violate the statute. See *General Motors Corp.*, 81 NLRB 779, 780-781, enfd. 179 F.2d 221 (C.A. 2); *The Scam Instrument Corp.*, 163 NLRB No. 39, Trial Examiner's Decision at pages 7-8, enfd. 394 F.2d 884 (C.A. 7); *Charles E. Honaker*, 147 NLRB 1184, 1194. The single question to be decided here is whether these principles apply to such benefits for employees who have already retired.

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[9] See Welfare and Pension Plans Disclosure Act, 1958, Section 2(a), 72 Stat. 997, 29 U.S.C. Section 301(a):

> The Congress finds that the growth in size, scope, and numbers of employee welfare and pension benefit plans in recent years has been rapid and substantial; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest: that they have become an important factor affecting the stability of employment and the successful development of industrial relations; * * *.

[10] Bureau of the Census, *Statistical Abstract of the United States* (1967), p. 53.

Many unions and employers now bargain about pension and health benefits for retired employees, reflecting a "wide-spread understanding of the law shared in industrial circles and among members of the labor relations bar." [11] Indeed, the "trend of welfare plans toward the inclusion of retired persons is a fact of today's industrial life * * *." *Blassie v. Kroger Co.*, 345 F.2d 58, 69 (C.A. 8). By enacting Medicare, Congress acknowledged and responded to the serious health needs of older Americans,[12] and, significantly, the Medicare amendments to Social Security were made available to already retired beneficiaries as well as to future beneficiaries.[13]

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[11] *United Drill & Tool Corp.*, 28 L.A. 677, 685 (Archibald Cox, arbitrator):

> [M]any companies, including the big steel and auto concerns, have promised to pay the more liberal pensions not only to those who are to retire in the future but also to those who have retired in the past. * * * Common practice can hardly change the law but it does reflect * * * a wide-spread understanding of the law shared in industrial circles and among members of the labor relations bar.

See *Pacific Maritime Association*, 28 L.A. 600, 607-608. See also p. [43], *infra*.

[12] Health Insurance for the Aged Act, 79 Stat. 290, 42 U.S.C. Section 1395.

[13] See S. Rep. No. 404, Part I, 89th Cong., 1st Sess. 23-24 (1965):

> In past amendments to the Social Security Act, when new programs have been developed or when significant changes have been made to meet a national need, the Congress has followed the practice of extending the new or enhanced benefits not only to those who will become eligible for them in future years but also to the individuals then currently on the rolls. This has been done, of course, with the knowledge that the current beneficiaries on the rolls have not made contributions specifically for the increased benefits or the new benefits then being provided. Of course, this means that the benefits going to the already-retired group, represent in a sense an "unfunded" liability which has to be met out of future contributions. However, the practice has always been to cover the present beneficiaries.

(*Continued on following page*)

To the Trial Examiner the issue of this case turns simply on whether retired employees fall within the statutory definition of "employee." Finding that they do not, he concludes that no bargaining obligation is owed to them from the day that they retire, even with respect to changes in benefits which were negotiated on their behalf in the past when they were actively employed.

His Decision rests upon an analysis of two distinct lines of cases which he loosely interweaves. First, he relies upon representation cases in which the Board has held that retired employees are not eligible to vote in Board-conducted elections to select a bargaining agent. *Public Service Corporation of New Jersey,* 72 NLRB 224, 229-230.[14] In these cases the Board decided only eligibility issues, intimating no opinion on the broader question involved here. Nevertheless, the Trial Examiner reasons that "if retired persons are excluded from a unit for the purpose of voting for a representative of that unit, manifestly they should be eliminated from the unit for purposes of collective bargaining relating to employees in that unit." This conclusion fails to consider the nature of eligibility determinations which are not intended to be definitive rulings on employee status for all purposes. Eligibility "hinges on whether the employees have suffi-

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(*Continued from preceding page*)

Basic to it is the recognition that the problem which such new legislation is designed to meet exists not only for those who will become eligible in the future but equally for present beneficiaries. *It may be noted that the same practices are often followed under private pension plans; namely, to extend benefit liberalizations to existing pensioners on the rolls when doing so for future pensioners.* [Emphasis supplied.]

[14] The Board there carefully noted that "even if pensioners were to be considered as employees, we believe that they lack a substantial community of interest with the employees who are presently in the active service of the Employers." 72 NLRB at 230.

cient interest in the terms and conditions of employment to warrant their participation in the election of a collective-bargaining agent." *H. P. Wasson and Company*, 105 NLRB 373, 374. Even regular, active, full-time employees, who are hired after the election eligibility date, are normally not eligible to vote,[15] yet they are unquestionably "employees" about whom the employer and union have a duty to bargain in good faith. Conversely, persons who are not actively employed may be eligible to vote in some circumstances. Among these are persons on military leave, sick leave, or layoff. One, on the one hand, may be an active employee and not be eligible to vote, while, on the other hand, one may be an inactive employee and remain eligible to vote.

A more pertinent line of cases cited by the Trial Examiner involves unfair labor practice situations where the statute has been applied to persons who have not been initially hired by an employer or whose employment has terminated. Illustrative are cases in which the Board has held that applicants for employment[16] and registrants at hiring halls[17]—who have never been hired in the first place—as well as persons who have quit[18] or whose employers have gone out of business[19] are "employees" embraced by the policies of the Act. The Trial Examiner distinguishes these cases on the ground that in each of them "the person involved—unlike the pensioners here—was a member of the working class" or on the ground that in each of those cases there was "the reasonable prospect that an employer-employee status was capable of being developed." These are legally tenuous distinctions drawn

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[15] *Wayne Knitting Mills, Inc.*, 1 NLRB 53, 55.

[16] *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 182-187.

[17] *Local 872, International Longshoremen's Association*, 163 NLRB No. 69.

[18] *Goodman Lumber Co.*, 166 NLRB No. 48.

[19] *Chemrock Corporation*, 151 NLRB 1074, 1076-79.

from cases dealing with distinctly different issues. We believe, on the contrary, that these cases support the conclusion that retired persons are "employees" under the policies of the Act. They plainly show that the Act's protection is not narrowly limited to those who are recorded on the employer's current payroll. Indeed, employees, who have been actively employed for a sufficient number of years to have earned a pension, have deep legal, economic, and emotional attachments to a bargaining unit which measurably exceed the attachments of others who have been held to be employees. If one can be an "employee" *before* he has been hired, or *after* his employer has gone out of business, or, even while he is on active military duty thousands of miles away, we cannot agree that one who has spent his productive years in the bargaining unit is beyond the protective ambit of "employee" rights.

When an employee retires from the bargaining unit, most of the threads which once bound him to the unit are severed, except those which affect his retirement rights. But his retirement status is a substantial connection to the bargaining unit, for it is the culmination and the product of years of employment. To accept the Trial Examiner's view that a retired employee is a legal stranger to the bargaining unit would require us to overlook obvious realities of human behavior as well as clear national policies which reject the view that workers are human machines who,[20] when their economic utility diminishes, may be cast aside and forgotten.[21]

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[20] Clayton Act, Section 6, 38 Stat. 731, 15 U.S.C. Section 17: "The labor of a human being is not a commodity or an article of commerce."

[21] See, e.g., Age Discrimination in Employment Act, 1967, Section 2, 81 Stat. 602, 29 U.S.C. Section 621; Welfare and Pension Plans Disclosure Act, 1958, Section 2, 72 Stat. 997, 29 U.S.C. Section 301; Executive Order 11141, 29 Fed. Reg. 2477 (1964).

Compensation for employment need not be synchronous with the performance of labor. Current services may be rewarded by benefits which arise (or continue) in the future,[22] and past services may be retroactively compensated with additional benefits.[23] Thus, it is not "active" employee status at the time of enjoyment of a negotiated benefit that controls whether it falls within "wages * * * [or] other terms and conditions of employment." The critical question is whether the benefit is founded on employment—past or present.[24] The health insurance plan here was negotiated for active employees to be enjoyed upon retirement, and its terms relate back to their active employment. For retired employees, the benefits paid to them in retirement are part of the return on their investment of a lifetime of labor. In some respects, an employee's retirement from active employment and his separation from the daily association with fellow workers is the very time when he is most vulnerable economically and most needs representation. This is the point at which his economic alternatives are most limited because of his age. It would virtually stand the Act on its head to hold that his employer is free to deal with him unilaterally and that the union may not represent him with respect to changes in the very plan which it negotiated for him.

The Board and courts have long held that a rigid definition of "employee" was not intended by Congress. *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177. In *Briggs*

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[22] For example, pensions, *Inland Steel Co., supra,* and health, accident, and life insurance, *W. W. Cross, supra.*

[23] See, e.g., *Bergen Point Iron Works,* 79 NLRB 1073, 1074 (retroactive application of contract terms).

[24] As the court stated in the *W. W. Cross* case, the term "wages" comprehends "* * * emoluments resulting from employment" and "* * * embraces within its meaning direct and immediate economic benefits flowing from the employment relationship." 174 F.2d 875, 878 (C.A. 1).

Manufacturing Company, 75 NLRB 569, 571, the Board held that:

> This broad definition covers, in addition to employees of a particular employer, also employees of another employer, or former employees of a particular employer, or even applicants for employment.

And the Supreme Court said in *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111, 129, 130:

> * * * the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute," leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by *underlying economic facts* rather than technically and exclusively by previously established legal classifications. * * *
>
> *That term, like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship. "Where all the conditions of the relation require protection, protection ought to be given."* [Emphasis supplied.]

The Court added:

> It is not necessary in this case to make a completely definitive limitation around the term "employee." That task has been assigned primarily to the agency created by Congress to administer the Act. Determination of "where all of the conditions of the relation require protection" involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus ac-

quired must be brought frequently to bear on the question who is an employee under the Act.

The lesson of the precedents, therefore, is that employee status is not a question to be resolved by the mechanical application of *a priori* definition; it requires an appraisal of the "underlying economic facts" with "reference to the purpose of the Act." *Id.* For the reasons stated above, the "underlying economic facts" of this case persuade us that Congress intended to confer employee status on retired employees with respect to health insurance plans affecting them.

Our conclusion that retired employees' retirement benefits are embraced by the bargaining obligation of Section 8(a) (5) is also supported by other provisions of the statute. Section 302(b) (5) (B) requires employer contributions to joint labor-management pension and health plans to be held in trust and to be administered by an equal number of employer and employee trustees. Congress' command that unions participate in the administration of such plans for retired employees through union appointed trustees requires unions to act as the "representatives" of retired employees. See *U. S. v. Ryan*, 350 U.S. 299. Moreover, in decisions interpreting the term "employees" in Section 302(b), appellate courts have held that it includes both "current employees and persons who were current employees but are now retired." *Blasslé v. Kroger Co.*, 345 F.2d 58, 70 (C.A. 8); *Teamsters, Local 688 v. Townsend*, 345 F.2d 77 (C.A. 8); *Garvison v. Jensen*, 355 F.2d 487 (C.A. 9). The Trial Examiner's Decision would create the anomaly that retired employees are not "employees" whose ongoing benefits are fit subjects of bargaining under Section 8(a) (5), while under Section 302(b) they are "employees" for the purpose of administering the same health insurance benefits. It would

create the further anomaly that a union would not be entitled to act as the representative of retired employees under Section 8(a)(5), while subject to an explicit statutory duty to act as their representative under Section 302(b).[25]

We conclude, therefore, that retired employees are "employees" and that changes in benefits which are rooted in their years of active employment are encompassed within the bargaining obligation of the Act.

IV. Independent of our finding that retired workers are "employees," we also conclude that the subject of retirement benefits for retired employees is embraced by the bargaining obligation of the statute because it vitally affects active bargaining unit employees. At the very least, the Union and current employees have a legitimate interest in assuring that negotiated retirement benefits are in fact paid and administered in accordance with the terms and intent of their contracts, and Respondent's unilateral modification of its outstanding collective-bargaining agreement might itself be dispositive of this case. See [pp. 47, 48] *infra*. But the interest of current employees is broader than assuring faithful contract compliance.[26]

Providing adequate economic security during retirement is a continuing concern of employers and employees.[27] For employers, the promise of retirement bene-

[25] The Internal Revenue Service has also concluded, in regulations interpreting the Revenue Code of 1954, that a benefit plan "is for the exclusive benefit of employees or their beneficiaries even though it may cover former employees as well as present employees. * * *" Internal Revenue Service Regulations, Section 1.401-1(b)(4), 21 Fed. Reg. 7277 (1956).

[26] See *Upholsterers v. American Pad Co.*, 372 F.2d 427 (C.A. 6).

[27] See generally Senate Report No. 1734, Welfare and Pension Plan Investigation, pages 11-13, 84th Congress, 2nd Session

(*Continued on following page*)

fits aids in obtaining good workers, retaining them, and easing their acceptance of retirement.[28] For active employees, provisions for pension and health benefits after retirement are an integral part of their total compensation. *Inland Steel Company*, 77 NLRB 1, 4-5; *W. W. Cross & Co.*, 77 NLRB 1162, 1164, fn. 5. To them retirement benefits may be viewed as a wage increase foregone, "deferred wages" or "human depreciation."[29] Active employees, in contemplation of whether their own health needs will be adequately met upon their future retirement, have a selfish as well as a compassionate interest in bargaining about the adequacy and the administration of benefits for retired employees.

The parties to this case agreed in 1962 to mandatory retirement at age 65. An active employee's morale and his willingness to accept such retirement may be significantly influenced by the adequacy of negotiated, post-retirement health insurance to meet rising costs in the future. Thus, in bargaining about mandatory retirement and pension eligibility dates, the flexibility or inflexibility

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(*Continued from preceding page*)

(1956); President's Committee on Corporate Pension Funds, *Public Policy and Private Pension Programs*, pages 1-2 (GPO, 1965); Harbrecht, *Pension Funds and Economic Power*, pages 6-10 (The Twentieth Century Fund, 1959); Kittner, *Health Insurance and Pension Plan Coverage in Union Contracts*, 85 Monthly Lab. Rev. 274-277 (March 1962).

[28] See Strong, *Employee Benefit Plans in Operation*, pages 1-9 (BNA, 1951); Hickey, *The Establishment and Administration of Pension Plans in the Labor Relations Process*, 18 Vanderbilt L.R. 151, 157-158; Harbrecht, *Pension Funds and Economic Power*, pages 74-91.

[29] See Harbrecht, *Pension Funds and Economic Power*, pages 91-99. However, we need not appraise the various differing conceptual approaches to retirement benefits other than to note they all implicitly recognize the employment connection of these benefits. See, Harbrecht, *op. cit.*; Ridgley, *The Report of the President's Cabinet Committee on Private Pension Plan Regulation: An Appraisal*, 63 Mich. L.R. 1258, 1264.

of retirement benefits is a factor which must enter the mix of considerations which will lead to agreement upon an overall retirement program.

It is not uncommon to group active and retired employees under a single health insurance contract with the result that "* * * active and retired rates [are] all combined in one rate or the retiree rate [is] subsidized by the actives." Foust, *Effect of Medicare on Privately Bargained Plans,* 19 N.Y.U. Conf. on Labor 273, 282 (1966). In such a combined plan for active and retired employees, like the plan in this case, it is the size and experience of the entire group which may determine insurance rates. In this respect the active employees could also benefit from the membership of retired employees in the group whose participation enlarges its size and might thereby lower costs per participant. Moreover, it is evident that changes in retirement benefits for retired employees affect the availability of employer funds for active employees. Therefore, the impact of decisions on such matters on active employees is direct and immediate.

For these reasons, we also conclude that bargaining about changes in benefits for retired employees is an appropriate subject for bargaining because of its inextricable relationship to and impact on the wages, hours, and working conditions of those actively employed in the bargaining unit.

V. Our dissenting colleague and the Respondent broadly challenge whether collective bargaining is a suitable means for resolving health and welfare questions affecting retired employees. Reduced to essentials, their position is that, once consummated, a collectively bargained plan of retirement benefits is frozen and immutable with respect to employees who have retired, unless an employer chooses to make changes unilaterally or volun-

tarily agrees to bargain over changes. This position is the antithesis of the statute's design that the collective-bargaining process should be a continuing one in which the parties share responsibility for the formulation, the execution, and the results of their agreement. Because the parties could agree in advance upon formulas which would provide for "flexible treatment" [30] of their retirement programs in anticipation of future contingencies,[31] it would be anomalous to hold that the statute does not encourage resort to collective bargaining in response to specific needs as they arise in the life of a retirement program.

Forced reliance on fixed, preretirement formulas has shortcomings which may lead to disappointing results in the operation of a plan. There may be a variety of changes in the experience of the covered group or in the operation or administration of the plan itself which the parties cannot foresee. The changing value of the dollar, rising medical costs, and other economic developments might alter the real level of benefits envisaged by the original formula. The parties may also reappraise their feelings as to the fair economic share owing to retired workers, just as society itself periodically reexamines its commitments to the elderly. In addition, insurance and health care plans are constantly developing new features and refinements.

There is also the impact of expanding government social welfare programs on private health plans. Recently, private health plans had to be meshed with Medicare in order to avoid duplication and to tailor supplemental,

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[30] *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 409.

[31] In anticipation of a long-term inflationary cycle, the parties might, for example, provide for an annual benefit increment of a certain percentage of the basic benefit or an increment tied to the cost-of-living index.

private coverage to needs of the particular employer and his employees. See Foust, *Effect of Medicare on Privately Bargained Plans,* 19 N.Y.U. Conf. on Labor 273-285; *Medicare and Negotiated Health Insurance for Workers,* 88 Monthly Lab. Rev. No. 9, pp. iii-iv (Sept. 1965); *Developments in Industrial Relations,* 89 Monthly Lab. Rev. No. 4, p. 420 (April 1966). This was of course the very problem which gave rise to the instant case.

With respect to new problems which arise under a health insurance plan for retired employees, collective bargaining is not only a suitable method for exploring different solutions, but it is probably the most rational and effective method. A plan which has its inception in the collaborative process of a labor-management agreement reflects the assumptions, arguments, and aspirations—as well as the compromises—of the parties to that process. While the process of collective bargaining does not guarantee that its agreements will be wise, the process does help to assure the acceptability of those agreements because they were reached through the participation and the commitment of the parties most affected. Moreover, to deny collective bargaining a role in the development of health benefits plans for retired employees might undermine their viability. These private plans provide an important supplement to governmental social welfare programs,[32] and an effective method of dispute settlement will contribute to their purposefulness.

Collective bargaining is a dynamic institution. It flexibly adapts to new challenges to industrial peace. As the Court of Appeals for the First Circuit has held, "* * * Congress did not intend to restrict the duty to bargain

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[32] See President's Committee on Corporate Pension Funds, Public Policy and Private Pension Programs, pages 22-25 (GPO 1965).

collectively only to those subjects which up to 1935 had been commonly bargained about in negotiations between employers and employees * * *"; rather it meant to compel bargaining "* * * with respect to any [employment] matters which might in the future emerge as a bone of contention between them. * * *" *W. W. Cross & Co. v. N.L.R.B.*, 174 F.2d 875, 878 (C.A. 1).[33] Thus, an examination of current practices and trends in negotiations is relevant in determining what is a mandatory subject of bargaining. "Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective-bargaining process." *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 211.

Bargaining on benefits for workers already retired is an established aspect of current labor-management relations. The United Auto Workers, the United Steelworkers, and the Amalgamated Transit Union, *amici curiae*, have cited many instances in which bargaining increases in benefits have been obtained for retired workers. Several examples of collective bargaining on the integration of Medicare into private health plans can be found in 89 Monthly Labor Rev. No. 4, page 420 (April 1966). See also Foust, *Effect of Medicare on Privately Bargained Plans*, 19 N.Y.U Conf. on Labor 273-285 (1966). This is pragmatic recognition that adjustments in retirement benefits for those already retired are suitable subjects for the collective-bargaining process. In our view holding these matters to be mandatory subjects of collective bargaining will "promote the fundamental purposes of the Act by bringing a problem of vital concern to labor and

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[33] See also *Houston Chapter, Associated General Contractors*, 143 NLRB 409, 413, enfd. 349 F.2d 449 (C.A. 5), cert. denied 382 U.S. 1026.

management within the framework established by Congress as most conducive to industrial peace." *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 211.[34]

Our dissenting colleague also argues that bargaining about benefits for retired employees will upset the "firm package of benefits [negotiated] for a fixed period." Our decision, however, does not introduce any element of uncertainty into the bargaining process that does not already exist. All employee benefits are subject to change at periodic intervals, either at the expiration of, or at times fixed by, the contract itself. At such times the "firm package of benefits" previously agreed upon becomes flexible, and the alterations which result from such bargaining might require revision of the parties' expectations and future planning. The dissent overlooks the fact that the parties before us have bargained about retirement benefits for retired employees for nearly 20 years. Moreover, in this case, the Employer unilaterally changed the "firm package of benefits," to which our dissenting colleague does not object. The logic of the dissent thus suggests the tenuous proposition that the package of benefits is "firm" only as a limitation on the Union's right to bargain about benefits for retired employees, but not "firm" as a limitation on the Employer's right to make unilateral changes. The fact that many employers and unions, like the parties before us, have long bargained about changes in health and other benefit plans for retired employees negates the dissent's concern that this is not a suitable subject for bargaining.

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[34] This conclusion does not, of course, preclude Respondent from bargaining hard, without concession, for broad areas of control over retirement benefits. See *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 408-409. However, Respondent here has gone beyond hard bargaining; it has taken the position that the Union has no statutory right to bargain for retired employees and that it may unilaterally make decisions affecting the rights of retired employees.

The dissent also fails to take account of the practical manner in which many retirement benefits plans are created and administered. Typically, a retirement benefit plan is created by a collective-bargaining agreement which is written only in general terms to provide for the creation of a plan and a method of financing. The details of eligibility, benefits, and administration are normally incorporated in a subsequently drafted trust agreement, not in the collective-bargaining agreement itself. In fact, even trust agreements are often written in general terms to permit the trustees to adopt specific regulations concerning eligibility and other matters, subject to periodic changes which the trustees may make as circumstances dictate. See *Kosty v. Lewis,* 319 F.2d 744 (C.A.D.C.),[35] cert. denied 375 U.S. 964. See also *In re Feldman,* 165 F. Supp. 190 (S.D.N.Y.). Thus, plans of this type are not static arrangements which, once executed, never change. They may, depending on their terms, undergo continuing change.

The dissent further asks "if the union may require bargaining over increases, could the employer not insist on decreases?" This is a complex and many-sided question which does not admit of a single, definitive answer here, nor is it relevant to the precise issue before us. The answer will doubtless depend in part upon the circumstances of each case.

There is a variety of formulas for creating, financing, and administering pension and health plans, and the legal implications of each may differ. For example, health plans

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[35] *Id.* at 748-749.

> We do not deny the authority of Trustees to revise pension eligibility requirements in the light of their experience. Flexibility of this kind seems especially necessary for the operation of this Fund, tied as it is to the fluctuating fortunes of the coal industry.

are of two main types: (1) those in which the collective bargaining agreement specifies only the level of the employer's contribution, without specifying the benefits which will be provided from the contribution; and (2) those in which the collective-bargaining agreement specifies only the level of benefits which the employees will receive, without specifying the cost obligation which the employer will incur in providing those benefits. How the parties choose to create, amend, or restructure such plans —consistent with their legal responsibilities to employee beneficiaries—is plainly a matter which Congress has entrusted to their judgment to be exercised in the light of their experience and the needs of affected employees. Normally, of course, retirement rights which are "vested" cannot be divested, but it does not inexorably follow that as a corollary "vested" rights may not be improved. What kinds of rights are "vested" in retired employees, when and how they vest, and, indeed, what "vesting" means in the context of a particular case are all problems of considerable importance which have not been entirely resolved in the courts and which are not presented by this case. See *Kosty v. Lewis, supra.* See also Harbrecht, *Pension Funds and Economic Power,* 53-61, 163-190; Strong, *Employee Benefit Plans in Operation,* 220-225. Thus, there is no necessity in this proceeding to decide whether and, if so, under what hypothetical circumstances an employer might be free to bargain about a decrease in retirement benefits being received by retired employees. We hold only that the duty to bargain about health care benefits does not end abruptly on the day that an employee retires and that his employer is not free on that day to deal with him unilaterally.

Finally, it is asserted that bargaining about retirement benefits for retired employees will raise difficult

questions in the event of changes in employee representatives or changes in employers. But that problem is not new in any respect. Parties always bargain in the present in contemplation of continuity in their relations. A change in the employer's or the union's status may indeed require reexamination of their needs and resources at that time.

VII. The Trial Examiner concluded that Respondent's March 1966 actions did not constitute a modification of health benefits for the reason that Respondent gave retirees the choice between supplemental Medicare and the existing health plan. However, the possible methods of adjusting the existing plan to Medicare's coverage may be considerably more varied than this unilaterally formulated choice offered by Respondent. See Foust, *Effect of Medicare on Privately Bargained Plans,* 19 N.Y.U. Conf. on Labor 273-285; *Medicare and Negotiated Health Insurance for Workers,* 88 Monthly Labor Rev. No. 9, pages iii-iv (Sept. 1965). Had the Union studied the matter and expressed its views in negotiations, a different option may have resulted. Whether Respondent's offer resulted in a desirable increase in retirement benefits is immaterial to our conclusion that Respondent was not free to act unilaterally; Respondent's establishment of a fixed, additional option in and of itself changed the negotiated plan of benefits. *C. & S. Industries, Inc.,* 158 NLRB 454, 457-458. Accordingly, we find that by unilaterally modifying its medical insurance plan for retired employees, Respondent violated Section 8(a)(5) and (1) of the Act.[36]

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[36] Section 8(d) of the Act, which defines the bargaining obligation of Section 8(a)(5), expressly provides that, with exceptions not relevant here, "no party to such contract shall terminate or modify such contract." That the Respondent's unilateral modification of this contract might also give rise to an

(Continued on following page)

The General Counsel does not contend, nor do we find, that Respondent was obligated to engage in mid-term bargaining with the Union over its proposal to negotiate amendments in the health insurance plan. While the parties are of course free to engage in mid-term bargaining voluntarily, we hold only, on the record of this case, that the Respondent violated the statute by making unilateral changes in the terms of an outstanding contract with respect to benefits for retired employees.

The Remedy.

Having found that Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom, and from like or related conduct, and that it take certain affirmative action to effectuate the policies of the Act.

Conclusions of Law.

1. Pittsburgh Plate Glass Company, Chemical Division, is an Employer within the meaning of Section 2(2) of the Act, engaged in commerce and business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union No. 1, Allied Chemical and Alkali Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By instituting unilateral adjustments in the health insurance plan for its retired employees, Respondent violated Section 8(a)(5) and (1) of the Act.

(*Continued from preceding page*)

arbitration proceeding or an action for contract enforcement does not preclude the Board's exercise of its statutory obligation to remedy the unfair labor practice. *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. 421; *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Pittsburgh Plate Glass Company, Chemical Division, Barberton, Ohio, its officers, agents, successors, and assigns, shall take the following action:

1. Cease and desist from:

(a) Refusing to bargain collectively with the above-named labor organization with respect to retirement benefits.

(b) Making unilateral adjustments in health insurance plans for retired employees, without first negotiating in good faith with the above-named Union concerning such adjustments.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board deems necessary and appropriate to effectuate the policies of the Act:

(a) Upon request of the above-named Union, rescind any adjustment in the health insurance plan for retired employees which Respondent unilaterally instituted.

(b) Mail a copy of the attached notice marked "Appendix" [37] to each retired employee and post copies in its

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[37] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order."

plant in Barberton, Ohio. Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by the Respondent's authorized representative, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 8, in writing, within 10 days from the date of this Decision, what steps have been taken to comply herewith.

Dated, Washington, D. C., July 9, 1969.

FRANK W. MCCULLOCH,
Chairman,

JOHN H. FANNING,
Member,

GERALD A. BROWN,
Member,

HOWARD JENKINS, JR.,
Member,

NATIONAL LABOR RELATIONS BOARD.

(SEAL)

Member Zagoria, dissenting:

I am constrained to dissent from the decision of my colleagues and I would affirm the result reached by the Trial Examiner.

Stripped to its essentials, this is a case where a union charges an employer unilaterally offered an additional option on its health plan for past pensioners. The Company said it did so because the Federal Medicare program made its own program obsolete, but, after union protests,

assured the pensioners they could choose to retain the original program without change. On this narrow base, the Board majority has erected a decision with far-reaching implications in the area of mandatory duty to bargain.

I do not question in the slightest the well-established principle that retirement and profit-sharing plans and other forms of deferred compensation are mandatory subjects for collective bargaining when the proposed beneficiaries are employees currently on the payroll, and it is the wages and benefits to be paid for their labor which is the subject of the negotiations.

The question in the present case, however, is whether *retirees* are employees in this unit and whether there is a duty to bargain for these former workers placed upon the shoulders of the Company and a duty placed on the Union *to represent them fairly in* such negotiations. Under the Act a union's status as exclusive bargaining agent is with respect to all employees in the appropriate unit. The fact that retirees are no longer working for the employer, are not on the payroll, probably have no access to the plant, or hope of recall to employment does suggest that their status is accurately described as pensioners, not as employees. Apart from the question whether retirees are "employees" as defined by the Act, it is clear to me that retirees are not within the bargaining unit. The Board itself recognizes this for it does not, for example, permit retirees to vote in a certification election; nor would the Board, I am confident, permit a group of retirees to initiate a decertification election. Indeed, in this case, and the *amicus* briefs indicate this may not be atypical, retirees are limited only to honorary nonvoting membership status by the union. This being so, the Act gives the union no authority or duty to represent them and imposes no obligation on the employer to bargain about them with the union.

I am not persuaded by the majority's analogies to other areas of Board law, and their contention that the terms "employee" and "unit" are flexible enough to encompass the present situation. One area mentioned concerns the Board's election eligibility rules, under which, it is pointed out, some individuals are not permitted to vote, even though by the time of the election they are employees in the unit. However, this rule merely provides an administrative cutoff date for convenience in conducting elections, and to prevent payroll padding and other possible abuses. It does not in my view have relevance in an area where such considerations are not present.

The majority's reference to the *Wasson* line of cases is likewise not pertinent. The Board did, at one time, as in *Wasson*, make a distinction between unit inclusion and eligibility to vote. It no longer does so[38] for reasons precisely in point here: if an employee has sufficient interests to be included in the unit, he should be given a voice in the selection of a bargaining representative; if he is not given such voice, he should not be included in the unit.

Lastly, the cases involving discrimination are readily distinguishable. Though an employer may violate Section 8(a)(3) by refusing to hire particular employees, he does not normally violate Section 8(a)(5) by refusing to bargain about them, where they have not yet been made his employees.[39] As the Board has stated in a related context:

> We do not regard as controlling for purposes of determining for whom an employer must bargain those cases cited * * * which hold that the antidiscrimination provisions of Section 8(a)(3), (4), and (b)(2) of the Act forbid discrimination against applicants for

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[38] *Denver-Colorado Springs-Pueblo Motor Way*, 129 NLRB 1184.

[39] *Piasecki Aircraft Corp.*, 123 NLRB 348, 349-350, enfd. 280 F.2d 575 (C.A. 3), cert. denied 364 U.S. 933.

> employment. The antidiscrimination provisions refer to "employee" *generally,* whereas, unlike those provisions, Section 8(a)(5) contains specific language requiring an employer to bargain for "*his* employees." [40]

The employees involved in the present case may have had no employment with the employer for 5, 10, or even 15 years. Unlike employees on sick leave or military leave, they have no prospect or intention of returning. In most respects retirees are in no different status than individuals who have left the bargaining unit for other reasons. In holding them to be within the unit for which the Union has a right to bargain, the Board is going beyond anything it has said or done in other types of cases.

Further, the majority position poses some difficult questions. For example, where the union currently representing employees in a bargaining unit is not the same one chosen by the retirees when they were actively employed, which union is the appropriate representative of the retirees? In some situations, the retirees may have earned their pension during a period in which the majority of employees rejected collective-bargaining representation. Is the present bargaining agent obligated to represent these retirees? If it does represent them, what is the extent of its duty of fair representation? Do the retirees have access to the Board or courts, if they feel they have been unfairly represented? May the bargaining agent require pensioners to comply with union-security requirements adopted by the active membership?

Now as to the bargaining itself, the statute requires bargaining "in good faith with respect to wages, hours, and other terms and conditions of employment," but retirees are no longer engaged in employment and the bargaining under discussion here relates to terms and con-

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[40] *Page Aircraft Maintenance, Inc.,* 123 NLRB 159, 163, fn. 5.

ditions of employment long since completed. An oft-cited advantage of collective bargaining is that it results in a specific agreement satisfactory to both sides setting out a firm package of benefits for a fixed period. The company can base its prices and general business policy on this and workers can insist on exact payment of the agreed-upon benefits. If mandatory bargaining is required, either party years later can reopen the agreement and unravel the provisions. Moreover, bargaining is a two-way street, and not only upward. Thus, if the union may require bargaining over increases, could the employer not insist on decreases?

As the majority view suggests collective bargaining is a dynamic institution. Indeed the examples cited of successful bargaining for increases in benefits for retired workers demonstrates that foresighted employers and unions, recognizing the mutuality of interest in retired workers, have used the institution of voluntary collective bargaining imaginatively. They have made adjustments although the affected group could no longer pose the threat of withholding its labor to implement its demands. They have found the subject suitable, even if not mandatory.

We are all understandably concerned that benefits promised to retirees be paid. In addition to individual court actions by aggrieved pensioners, many unions have voluntarily, and at considerable cost to themselves, undertaken to represent retirees in claims against employers and, similarly, many employers have voluntarily, also at considerable cost to themselves, undertaken to improve benefits to retirees, recognizing the impact of inflation on those receiving fixed benefits. Many unions and companies, recognizing their mutual interest in retiree benefits, have voluntarily worked out arrangements to improve past pensioners' rights and benefits. These voluntary

agreements, these voluntary representations, are a tribute to the humanistic quality of an enlightened labor-management relationship, but to hold that these matters are the subject of mandatory bargaining, while perhaps socially desirable, is, in my judgment, beyond the intent of the statute. I would therefore, like the Trial Examiner, dismiss the complaint.

Dated, Washington, D. C., July 9, 1969.

SAM ZAGORIA,
Member,
NATIONAL LABOR RELATIONS BOARD.

APPENDIX.

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A Decision and Order of the
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(As Amended)

we hereby notify our employees that:

WE WILL NOT refuse to bargain with LOCAL UNION NO. 1, ALLIED CHEMICAL AND ALKALI WORKERS OF AMERICA, with respect to retirement benefits.

WE WILL NOT unilaterally institute adjustments in health insurance plans for retired employees, without first negotiating in good faith with the above-named Union concerning such adjustments.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request of the above-named Union, rescind any adjustments made in the health insurance plan for retired employees which we unilaterally instituted.

PITTSBURGH PLATE GLASS COMPANY,
CHEMICAL DIVISION.

(Employer)

Dated _____ By _____ _____
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1695 Federal Office Building, 1240 E. 9th Street, Cleveland, Ohio 44199, Telephone 216-522-3715.

APPENDIX E.

DECISION OF TRIAL EXAMINER.

TXD-196-67
Barberton, Ohio

Case No. 8-CA-4202.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

PITTSBURGH PLATE GLASS COMPANY,
CHEMICAL DIVISION,
and
LOCAL UNION NO. 1, ALLIED CHEMICAL AND
ALKALI WORKERS OF AMERICA.

TRIAL EXAMINER'S DECISION.

STATEMENT OF THE CASE.

JAMES V. CONSTANTINE, Trial Examiner: This case is before a Trial Examiner of the National Labor Relations Board upon a complaint issued on November 22, 1966, by the General Counsel of the Board (through the Regional Director for the Eighth Region, at Cleveland, Ohio) pursuant to Section 10(b) of the National Labor Relations Act, herein called the Act. 29 U.S.C. 160(b). That complaint is based on a charge filed on April 12, and amended on November 22, 1966, by Local Union No. 1, Allied Chemical and Alkali Workers of America, against Pittsburgh Plate Glass Company, Chemical Division, Respondent herein. Essentially, the complaint alleges that Respondent has infringed Section 8(a)(1) and (5) of the Act, and that such conduct affects commerce within the meaning of Section 2(6) and (7) thereof. Respondent has answered, admitting some facts but denying that it perpetrated any unfair labor practices.

Pursuant to due notice this cause came on to be heard before me at Mansfield, Ohio, on January 17, 1967. All parties were represented at and participated in the hearing and were granted full opportunity to introduce evidence, examine and cross-examine witnesses, submit briefs, and offer oral argument. Respondent's motions to dismiss at the close of the hearing were denied. Briefs of superior excellence have been received from all parties.

This case presents the question of whether an employer has failed to bargain collectively with the majority representative of his employees (a) by unilaterally changing the pension benefits of retired employees provided for in a collective-bargaining contract, and (b) whether the employer's conduct constitutes a unilateral change.

Upon the entire record in this case, and from my observation of the witnesses, I make the following:

Findings of Fact.

I. Jurisdiction.

Respondent, a Pennsylvania corporation, is engaged in manufacturing and selling glass and glass products. From its Barberton, Ohio, plant, which is the only facility involved in this proceeding, Respondent annually ships goods valued in excess of $50,000 to points located outside the State of Ohio. I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction over Respondent in this proceeding.

II. The Labor Organization Involved.

Local Union No. 1, Allied Chemical and Alkali Workers of America, herein called Local No. 1 or the Union, is a labor organization within the contemplation of Section 2(5) of the Act.

III. The Unfair Labor Practices.

Virtually no dispute exists as to the facts, so that fundamentally an issue of law has been unfolded by the record.

Since January 1949, the Union has been the exclusive representative for the purposes of collective bargaining of the employees of Respondent in a unit composed of:

> All hourly rated employees at the Respondent's Barberton, Ohio, plant, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

I find that said unit is appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. Since 1949, Respondent and the Union have negotiated several collective-bargaining contracts, as more fully described below.

In the summer of 1950 the parties negotiated a collective-bargaining contract which, among other things, provided for medical insurance for employees and, for the first time, contained a pension plan. During negotiations the parties agreed orally, but did not incorporate into the contract or otherwise reduce to writing, that retired employees could participate in the above-mentioned medical insurance benefits by paying a stipulated premium. No company contribution was made towards that premium. Such premium was deducted from pension payments. This arrangement as to those on retirement continued without alteration until 1954, when it was unilaterally changed by Respondent. Then the new benefits for retirees remained unchanged until 1960.

In the fall of 1959, during discussions relating to extending their collective-bargaining agreement, the parties bargained for and agreed to modify their pension agree-

ment and the medical insurance benefits of retirees on pension. This change, which went into effect in 1960, granted retired pensioners an increase in the maximum daily amount of hospitalization benefits. Unlike its predecessor, this agreement concerning medical insurance benefits for retirees was incorporated in a written document. See Company Exhibit 1. During the above discussions the Company challenged the Union's right to negotiate pensions and medical insurance programs for employees who had already retired.

Again, in 1962, the parties, while negotiating a new collective-bargaining contract, bargained for and agreed upon certain modifications of Respondent's pension plan, but left intact the medical insurance benefits of pensioners. See General Counsel Exhibit 4 for the Pension Plan. However, Respondent in a separate, contemporaneous understanding, which was embodied in a written instrument, for the first time became obligated to contribute towards the medical insurance premium of any employee who retired on or after June 28, 1962, and who elected to subscribe to such an insurance plan. Such contribution was $2 a month. See General Counsel Exhibit 2 and Respondent Exhibit 5. At the same time the parties also executed a collective-bargaining agreement in still another and distinct document. See General Counsel Exhibit 3.

During negotiations in 1964 for a new collective-bargaining agreement, the parties modified the medical insurance provisions for those already on pension whereby Respondent increased by $2 its contributions toward the cost of premiums for medical insurance for such pensioner, thus contributing $4 a month toward the premium. It was further agreed that this $2 increase would be eliminated by Respondent in the event that "Medicare or a program of Government type insurance" was instituted.

See General Counsel Exhibit 5. This modification was in the form of a separate supplement or addendum to a bulky document synchronously adopted as a collective-bargaining contract. See General Counsel Exhibit 6 for the latter contract.

About November 23, 1965, the parties met to discuss certain pending grievances. When their talks upon other subjects were concluded, the Union requested Respondent to negotiate a program of insurance which would provide retirees, whether covered by Medicare or not, with benefits not provided by Medicare. At this time Medicare had been passed by Congress to go into effect in 1966. Respondent's labor relations director, John Rodgers, replied that the Company would take this matter under advisement and give the Union an answer "at an appropriate time." Shortly before March 21, 1966, the Union reminded the Company's labor relations supervisor, David Redle, that it had not received a reply to its said request of the previous November; but although Redle professed ignorance thereof, he promised to refer it "to the proper people." He did. Thereafter the Company's officials thoroughly considered it. About March 10, Rodgers called Williams to express the belief that Respondent "would have something" in a week or 10 days.

Then on March 21, 1966, Industrial Relations Director Rodgers asked Vice President Williams of Local No. 1 to meet with Rodgers and Plant Manager Harris at about 3 p.m. They did meet at the appointed time. A committee from the Union accompanied Williams thereat. Asserting that the Company had an answer to the Union's question of the previous November, Rodgers insisted that by virtue of the agreement reached in 1964, Respondent was entitled to "reclaim" $2 of its $4 contribution if a Medicare program was adopted. Continuing, Rodgers observed that Medicare had been enacted and that, beginning July 1,

1966, the Company would "reclaim" $2 a month from each retiree receiving the $4 a month contribution. Further, Rodgers said that Respondent intended to "cancel out" its insurance program for all retirees because Medicare had rendered this feature of retirement benefits practically useless, but added that $3 a month would be paid to such pensioners towards the cost of subscribing to Medicare. This meant an additional $1 a month to those receiving a $2 a month contribution after July 1, 1966, when $2 of the above $4 would be "reclaimed." Rodgers then commented that the present insurance program for pensioners, among other things, prevented payment of insurance benefits if another group plan paid similar group benefits, and he considered that Medicare qualified as such other group plan.

Union Vice President Williams took issue with Rodgers on this. Although Williams conceded to Rodgers that as a matter of contract the Company was empowered to cease making the extra $2 contribution, Williams insisted that Respondent was not entitled to cancel the insurance of pensioners since it was guaranteed by the agreement of 1964. In addition, Williams contended that the Company was powerless to make such a unilateral change without bargaining with the Union on it because it was a bargainable subject. Finally, Williams posed the question of what Respondent would do for retirees under 65 who were ineligible for Medicare and for all other pensioners, regardless of age, who were not qualified to apply for Medicare. Rodgers replied that Respondent would have to work out a program for such retirees as well as for their wives. Also, Rodgers mentioned that insurance for retirees was optional with them, that the Union had no right to bargain for employees who had retired, and that the Company's bargaining with another union for changes in benefits of persons already retired,

to which Williams adverted, involved "a different division under a different management." Williams did not question the assertion of Rodgers that insurance was optional with retirees.

On March 23, 1966, Plant Manager Harris telephoned to Union Vice President Williams that, upon reconsideration, the Company had rescinded its decision to cancel the insurance benefits of pensioners and, instead, would offer each group of retirees by mail an option to cancel or retain their insurance and, to those who chose to cancel, would contribute $3 a month to be used toward the cost of premiums for those electing to be covered by Medicare. (Such letters were sent later, and copies thereof were furnished to Local No. 1. See General Counsel Exhibit No. 7.) Williams reiterated his position of March 21, 1966, and again demanded that this was a bargainable matter.

On October 11 and 20, 1966, in discussing a new collective-bargaining agreement, the Company twice orally proposed to pay a $3 contribution for those retirees electing to cancel their insurance, in effect reiterating its position taken on March 23, 1966. This was unacceptable to the Union. This proposition was also submitted in writing on October 11, 1966. See General Counsel Exhibit 8, p. 4. The Union rejected it.

No further oral or written communications concerning medical insurance benefits have passed between the parties.

Concluding Findings and Discussion.

In his brief, the General Counsel has vigorously and ably contended that Section 8(a)(5), amplified by Section 8(d), imposes upon an employer a duty to meet and confer with a union with respect to wages, hours, and other terms and conditions of employment, and that this

obligation "prohibits unilateral changes in conditions of employment which are mandatory subjects of bargaining or unilateral changes which modify contractual terms or conditions of employment." Of course this accurately portrays the present state of the law. *George E. Light Boat Storage, Inc.*, 153 NLRB 1209, enforced, 64 LRRM 2457 (C.A. 5). It is binding upon me, and I shall follow it to the extent that the facts found herein render it pertinent. Hence, the initial question is to determine whether the record discloses that Respondent has failed to meet and confer with Local No. 1 upon wages, hours, and other terms and conditions of employment regarding employees in the unit heretofore found to be appropriate.

In this connection, I find that pensions and health insurance are mandatory subjects of bargaining with respect to employees in the unit above described. *Phelps Dodge Copper Corp.*, 101 NLRB 360, 379, and cases there cited; *Inland Steel Co.*, 77 NLRB 1, 170 F.2d 247 (C.A. 7). And I further find that Respondent did not confer with the Union regarding the proposed changes in the health insurance benefits of retirees as set forth in General Counsel Exhibit 7. While it is true that Respondent had mentioned to the Union that it intended to make such offers to the retirees, it is equally patent that Respondent refused to discuss such proposals with the Union and expressly disagreed with the Union when the latter maintained these were bargainable matters. Hence, I find that Respondent's statements to the Union relative to such announced modifications do not rise to the stature of negotiations embraced by the statutory definition of "to bargain collectively" in Section 8(d) of the Act.

The record is barren of any evidence that Respondent altered, changed, or modified unilaterally any pension benefit to be received in the future by employees now in the appropriate unit. Accordingly, the allegations of the

complaint alleging such unilateral action have not been sustained, and I shall recommend dismissal of the complaint as to these allegations.

One other matter may be disposed of at this stage of the Decision, i.e., the reduction of Respondent's contribution to the insurance premiums from $4 to $2 a month. Since the contract vested this privilege in Respondent—a contention which the Union did not dispute—no refusal to bargain may be based upon Respondent's unilateral reduction of its contribution from $4 to $2 a month. Accordingly, upon this segment of the case no violation of Section 8(a)(5) has been established.

Since I have found that Respondent has refused to meet and confer with the Union regarding changes unilaterally to be made by Respondent, the question is whether such refusal (except as to the lawful decrease of $2 a month described above) constitutes an infringement of Section 8(a)(5) of the Act which enjoins an employer to "bargain collectively with the representatives of his employees." This in turn depends on whether retired persons no longer employed in the unit enjoy the status of employees within the contemplation of Section 8(a)(5) of the Act.

It is my opinion, and I find, that pensioners and retirees are not employees as defined by Section 2(3) of the Act (*Public Service Corporation*, 72 NLRB 224, 230), and, therefore, are not employees within the meaning of Section 8(a)(5). Hence, they are not employees in the unit which Respondent represents. Therefore their pensions and other benefits received as retirees and pensioners are not the mandatory subjects of collective bargaining, and Respondent is not under a statutory onus to bargain thereon. While no express Board or court adjudications so hold, certain determinative factors point to this conclusion.

1. In the first place, pensioners patently are not employed in the unit. Not only are they not now employed by Respondent, but they have no reasonable expectation of being re-employed under the terms of Respondent's pension plan agreement with the Union. Of course I recognize that persons may remain in a unit as employees while not actually employed therein; but in such instances, i.e., when on sick leave, other leave, or layoff status, the conditions of nonemployment contemplate not only a continuation of the employer-employee relationship but also a resumption of or return to work in the predictable future.

And I further acknowledge that in some instances a person not employed in a unit may be treated as an employee for some purposes of the Act. Thus, an applicant for employment (*Phelps Dodge v. N.L.R.B.*, 313 U.S. 177), or a registrant at a hiring hall (*Houston Chapter, A.G.C.*, 143 NLRB 409, 412-413), or an independent contractor (*N.L.R.B. v. Hearst Publications*, 322 U.S. 111), or a striker (Section 2(3) of the Act), or persons losing jobs upon a change in ownership. (*Chemrock Corporation*, 151 NLRB 1074), all have been held to be employees under the Act. But in all these situations a fundamental ingredient—absent in the instant case—has been the reasonable prospect that an employer-employee status was capable of being developed. And cases like *Briggs Mfg. Corp.*, 75 NLRB 569, cited by the Union, are distinguishable, because there the person involved—unlike the pensioners here—was a member of the working class.

However, I am unable to accept Respondent's argument that pensioners may not be treated as employees because they lose their membership in the Union when they retire. This conclusion follows as a corollary of the rule that a labor organization may act as a collective-

bargaining representative of employees in a unit regardless of whether it admits such employees to its membership. *F. C. Russell Company,* 115 NLRB 1015 n. 5. Therefore, union membership is not a compelling factor on the issue here. Nevertheless, to reject this contention does not alter the result reached herein.

2. Secondly, in comparable situations the Board has considered persons not employed in a unit as not embraced by that unit, even though they formerly may have been part of it. Thus, when employees in a unit are promoted to supervisors they thereby are excluded from the unit and, so long as they retain their supervisory capacity, the bargaining representative of the unit may not as a matter of right require bargaining with respect to them. *Retail Clerks International Association, et al.,* 96 NLRB 581; *N.L.R.B. v. Retail Clerks,* 186 F.2d 371, 31 LRRM 2606, 2609, 203 F.2d 165 (C.A. 9).

Further, the Board has specifically held that retired persons formerly employed in a unit are ineligible to vote in an election to determine whether a collective-bargaining agent shall represent the employees currently working in that unit. *Taunton Supply Corp.,* 137 NLRB 221, 223; *W. D. Byron & Sons,* 53 NLRB 172, 175. If retired persons are excluded from a unit for the purpose of voting for a representative of that unit, manifestly they also should be eliminated from the unit for purposes of collective bargaining relating to employees in that unit.

Upon this aspect of the proceeding, the following situation is not difficult to visualize. Suppose that union A represents the employees in unit X in the plant of an employer, and that union B represents the employees in unit Y of the same employer in the same plant. If employee C transfers from unit X to unit Y, patently union A no longer represents employee C and may not bargain for

him because he no longer is employed in unit A. Citation of authority would be supererogatory. Nor may an employer demand that a Union bargain as to units whose employees work for another employer. See *United Mine Workers v. Pennington,* 381 U.S. 657, 666-667. Cf. *Local 24 v. Oliver,* 358 U.S. 283.

A final example suffices. It is not unusual for one union, A, to be displaced as the bargaining representative of a unit by another union, B, or no union. In such instances, while it is true that rights under the contract between union A and the employer may survive even after union A has been replaced by union B or no union (See *John Wiley & Sons, Inc., v. Livingston,* 376 U.S. 543), it is equally true that union A may not insist upon bargaining for employees in the unit. Cf. *L. B. Spear and Company,* 106 NLRB 687, 689; *Retail Clerks v. Lion Dry Goods, Inc.,* 369 U.S. 17. See *Southern Conference of Teamsters v. Red Ball Motor Freight, Inc.,* 64 LRRM 2545, 2549 (C.A. 5). If material, I find that Local No. 1 herein is not remediless, for I find that, since rights survive under the contract, suit may be brought, either for damages, specific performance, or both, to remedy any breach thereof. Cf. *Modine Mfg. Co. v. I.A.M.,* 217 F.2d 326 (C.A. 6); *McGuire v. Humble Oil Co.,* 355 F.2d 352 (C.A. 2).

3. I find that the pensioners' benefits under the contract are vested and survive the expiration of the contract. *N.L.R.B. v. Frontier Homes Corp.,* decided 2/6/67 (C.A. 8); *United Steelworkers of America v. Porter,* 64 LRRM 2201 (D.C.W.D. Pa.). In my opinion *N.L.R.B. v. Cone Mills Corporation,* 64 LRRM 2436 (C.A. 4), is distinguishable, for the nature of the rights there involved dissolved with the termination of the contract. Additionally, I find that the Union in the instant case at most has demonstrated that Respondent has failed to abide by its obliga-

tions under the contract. Of course, a breach of contract does not preclude a finding that Respondent thereby also committed an unfair labor practice. *Smith v. Evening News Assn.*, 371 U.S. 195; *C. & C. Plywood v. N.L.R.B.*, ____ U.S. ____, 64 LRRM 2065; *N.L.R.B. v. George E. Light Boat Storage, Inc.*, 64 LRRM 2457 (C.A. 5). Nevertheless, a breach of contract is not *per se* an unfair labor practice; and, since the record discloses a breach without more, as found above, I conclude that Respondent's purported unilateral modification of the medical benefits of retirees merely subjects Respondent to an action or suit based upon the contract provisions.

In this area of the case I do not pass upon the question of whether an employer and a union may, by contract, reduce the vested benefits of retirees. Cf. *Upholsterers' Union v. American Pad Co.*, 64 LRRM 2200 (C.A. 6). It would seem, however, that fixed rights may not be adversely affected by the parties to a collective-bargaining contract. Thus, I doubt that an employee can be compelled to disgorge some of his wages already received because of subsequent negotiations between the Union and the employer, or that employer contributions actually made to a savings plan may later be withdrawn by agreement between the employer and the Union. In *Oliver Corporation*, 162 NLRB No. 68, the matters sought to be bargained about were not vested and also related to present working conditions; hence, it was not fatal that some of these matters pertained to employees who had already been terminated.

Certain arguments of the General Counsel and the Union deserve comment at this point.

First, they contend that these benefits are part of the overall collective-bargaining contract negotiations and, therefore, affect employees admittedly in the unit. But

this means no more than that pensions for employees in a unit are subjects of mandatory collective bargaining, a fact which I have already found and which is not seriously disputed by Respondent. But the question is not whether pensions may be negotiated for employees in the unit; rather, it is whether the Union may bargain for retirees who are no longer employed in the unit. Further, the Union herein may not insist upon bargaining for employees in another unit, such as office clericals, even though (a) some or all of those clericals are transferees from the Union's hourly rated unit, and (b) the wages and other benefits received by the office clericals manifestly affect employees in the hourly rated unit. Hence, I conclude that this argument is not well taken.

Then again, the argument is pressed that pension benefits are deferred earnings or benefits, and, therefore, they constitute mandatory subjects of collective bargaining. It is axiomatic that pensions for employees admittedly in the unit are subjects of mandatory collective bargaining, and I have already so found. *Inland Steel Co.*, 77 NLRB 1, enforced, 170 F.2d 247 (C.A. 7); *Phelps Dodge Copper Corp.*, 101 NLRB 360, 379. It may also be conceded that pension plans may be classified as deferred earnings or benefits and, as such, are mandatory subjects of collective bargaining when comprehending those employees actually employed in a unit. But this decides nothing, for the question in this case is whether such deferred earnings may be the compulsory subject of further negotiations after those entitled to the same are no longer in the unit and are ineligible to return to the unit. This question must be resolved by ascertaining the status of those receiving the pensions; and, since they do not qualify as employees under Section 2(3) of the Act, Sections 8(a)(5) and 9(a) do not become operative as to

them. Accordingly, I find that this contention may not be sustained.

General Counsel also cites, as tending to uphold his position, cases interpreting the word "employees" in Title III of our Act. Apart from the fact that the word "employees" in Title III may sometimes connote different classes from "employees" in Title I (*United States v. Ryan*, 350 U.S. 299, 306-307), these cases to which the General Counsel alludes in my opinion do not stand for the proposition that pension benefits actually received by retirees are subjects of compulsory collective bargaining. He refers to *Local 688 v. Townsend*, 345 F.2d 77 (C.A. 8); *Blassie v. Kroger Company*, 345 F.2d 58 (C.A. 8); and *Garvinson v. Jensen*, 355 F.2d 487 (C.A. 9). They merely hold that collective-bargaining contracts may lawfully provide that employees who have retired shall enjoy the benefits described in Section 302(c)(5) of the Act, and that such contracts may provide that such individuals shall receive such benefits after they retire and need not restrict benefits to employees working at the time.

But I have already found that the pension benefits to be received by an employee when he retires are subjects of mandatory collective bargaining and that an employer may be held accountable for failure to comply with a contract which contains such provisions. On the other hand, it is desirable again to stress that the issue in the instant case is not whether retirees may be beneficiaries of benefits pursuant to a collective-bargaining contract or whether suit may be instituted if contract clauses providing those benefits are not honored, but instead, the question is whether such benefits are subjects of further mandatory collective bargaining as to those persons who no longer are employed in the unit represented by the Union.

Finally, the General Counsel maintains that medical

benefits enjoyed by retirees are subjects of permissive or voluntary collective bargaining within the purview of *N.L.R.B. v. Borg Warner Corp.*, 356 U.S. 342, and that, since the parties have voluntarily negotiated an agreement thereon, such agreement may not be unilaterally modified during the term of the contract except by complying with Section 8(d) of the Act. Upon this aspect of the case I find that the foregoing benefits are subjects of permissive or voluntary bargaining (see *Mill Floor Covering, Inc.*, 136 NLRB 769), and that the parties have a contract or agreement covering them. Additionally, I find that the Board would require the parties to incorporate into a written document the terms of their understanding concerning this permissive subject of collective bargaining. *Associated Building Contractors of Evansville, Inc.*, 143 NLRB 678, 680. It follows, and I further find, that Section 8(d) proscribes mid-term modification of said agreement by unilateral action of either party.

But I am unable to find that Respondent has modified or changed this agreement. Although I find that Respondent wrote to retirees the letters set forth in General Counsel Exhibit 7, I find that such letters do not modify the agreement between Respondent and the Union. Initially, I find that they were not sent to present employees working in the unit. In addition, although the first letter in said series mentions that Respondent will make a $3 a month contribution towards Medicare, it is offered only to pensioners who are not enrolled in any medical plan provided by the collective-bargaining agreement. Hence, no change in the terms of that agreement is discernible in the language of this first letter.

The second, third, fourth, and fifth letters in said series offer retirees an election to accept Medicare or to continue in effect the current medical benefits conferred

upon them by the contract between Respondent and the Union. I do not construe these last four letters as modifying said agreement, since employees were free to decline such offer, so that I find that they do not constitute a mid-term change of the contract contemplated by Section 8(d) of the Act. This situation is somewhat analogous [to] that in which an employer offers an employee in one department, represented by a labor organization, an opportunity to transfer to another department, not represented by a union, where wages are different. In this latter event it would seem that, since the employee is given a choice to retain his present position, the offer of another job at other wages does not amount to a mid-term unilateral change of the collective-bargaining contract.

Upon the basis of the foregoing findings of fact, and upon the entire record in this case, I make the following:

Conclusions of Law.

1. Local No. 1 is a labor organization within the meaning of Section 2(5) of the Act.

2. Respondent is an employer within the meaning of Section 2(2), and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Pensions and other benefits to be received by employees in an appropriate unit after they retire are subjects of mandatory collective bargaining between the employer and the exclusive collective-bargaining agent selected by a majority of such unit.

4. Persons actually retired and receiving pensions and who have no reasonable expectation of being re-employed in the appropriate unit from which they retired are not employees within the meaning of Section 2(3) of the Act.

5. Pensions and other benefits received by persons after they retire from the appropriate unit in the manner set forth above are not subjects of mandatory bargaining, but are subjects of permissive or voluntary collective bargaining.

6. The pensions and other benefits of persons actually retired and involved in this proceeding are vested rights and survive the expiration of any one or more contracts creating such benefits.

7. Respondent has not committed any unfair labor practices as alleged in the complaint.

RECOMMENDED ORDER.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, it is recommended that the Board dismiss the complaint herein in its entirety.

Dated at Washington, D. C.

JAMES V. CONSTANTINE,
Trial Examiner.

APPENDIX F.

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES.

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or elect such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act, (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing:

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract

shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and

conditions can be reopened under the provisions of the contract.

* * * * *

REPRESENTATIVES AND ELECTIONS.

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * * *

Relevant provisions of Title III of the Labor Management Relations Act, 29 U.S.C. Sec. 186, are as follows:

Section 302 (c) The provisions of this section shall not be applicable:

* * * * *

(5) with respect to money or other things of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal, income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a writ-

ten agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training program: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.

LIBRARY

In the Supreme Court of the

OCTOBER TERM, 1973

No. 73-1232

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA,
LOCAL UNION NO. 1,

Petitioner,

v.

PITTSBURGH PLATE GLASS COMPANY,
CHEMICAL DIVISION,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. _____.

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1,

Petitioner,

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

Petitioner, Allied Chemical & Alkali Workers of America, Local Union No. 1, intervenor in the proceeding below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on June 10, 1970.

OPINION BELOW.

The opinion of the court of appeals is reported at 427 F.2d 936 (1970) (App. A, pp. 12-19).* The order denying petition for rehearing of the National Labor Relations Board is printed in Appendix C, p. 22. The findings of

* All appendices are printed and bound separately in one volume.

fact, conclusions of law and order of the National Labor Relations Board (App. D., pp. 22-55) are reported at 177 NLRB No. 114 (1969). The trial examiner's decision is printed in Appendix E, pp. 55-73.

JURISDICTION.

The judgment of the court of appeals was entered on the 10th day of June, 1970. A timely petition of the National Labor Relations Board for rehearing *en banc* was denied on the 31st day of July, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

(1) Whether an employer is required to bargain with an incumbent union about changing health insurance benefits previously negotiated with the union covering employees who had retired.

(2) Whether the Board properly found that the Company unilaterally changed its negotiated health insurance plan for employees who had retired, thereby violating Section 8(a)(5) and (1) of the Act.

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix F, pp. 74-78.

STATEMENT.

A. THE BOARD'S FINDINGS OF FACT.

Following the enactment of Medicare the Union sought in-term bargaining with the Company concerning its effect upon the health plan of retired employees who had been employed by the Company in the collective bargaining unit represented by the Union. The Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union about its request to adjust the Company's plan to the benefits provided by Medicare. The Board also found that the Company violated the Act when it unilaterally changed its health insurance program for retired employees.

The Union has been the exclusive collective bargaining agent since January, 1949 for all of the Company's hourly-rated employees at its Barberton, Ohio plant (App. D, p. 24). In 1950 the parties negotiated a labor agreement containing provisions for a pension, hospitalization and surgical insurance plan (App. D, p. 24). Beginning in that year the parties provided hospitalization insurance for retired employees under an oral agreement (App. D, p. 24). Continuing thereafter until 1964, the Union and the Company at appropriate times negotiated and entered into more formal agreements providing a health insurance plan for the retired employees (App. D, pp. 24, 25). The parties likewise agreed on an increase in pensions for employees retiring after June 28, 1962, and age 65 became the mandatory retirement age beginning in June, 1964 for all bargaining unit employees (App. D, p. 25):

In 1964 the Company agreed to raise its monthly contributions from $2.00 to $4.00 per month toward the cost of the insurance premium for those employees who

retired after June, 1964. It was understood that if Medicare was enacted the Company would withdraw the extra $2.00 contribution for the retirees (App. D, pp. 25, 26).

Medicare was passed July 30, 1965 and became effective on July 1, 1966.[1] In November, 1965, the Union proposed that the parties negotiate supplemental insurance benefits which were not available to the retired employees under the Medicare program. The Company answered that this request would be studied. In March, 1966 the Company was reminded that it had not replied to the Union's earlier request.

On March 21, 1966 the Company informed the Union that because of Medicare it would cease the contribution of the extra $2.00 per month for each retired employee which had been added under the terms of the 1964 labor agreement. The Company also stated that it would cancel the retired employees' insurance plan because Medicare had reduced the value of this plan so as to make it worthless, and, in any event, the Company's insurance carrier would not duplicate any benefits provided by Medicare (App. D, p. 26). Instead; the Company decided to contribute $3.00 a month to each eligible retired employee to be applied by him toward the cost of his supplemental Medicare coverage.[2] The Company refused the Union's request to bargain on the latter's proposal to "add-on" benefits not provided by Medicare, and the Company challenged altogether the Union's right to bargain for retired employees (App. D, pp. 26, 27).

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[1] 79 Stat. 291, 305, 42 U.S.C. Section 1395-1400(s), as amended by 81 Stat. 821, enacted Jan. 2, 1968.

[2] Under Medicare Part B, those who enrolled in the supplementary medical insurance program paid initially $3.00 a month for these added benefits. 42 U.S.C. 1395j.

The Union conceded the Company's right under contract to cease its added $2.00 contribution. It protested, however, the modification of the contract entitling retirees to participate in the health insurance plan and requiring the Company to contribute $2.00 per month for this purpose (App. D, p. 26). The Company's modification posed other problems for the Union as well. The Union asked what the Company planned respecting retired employees or their wives who were under age 65 and not eligible for Medicare (App. E, p. 61). The Company advised that it would originate a new program to cover these retirees and their wives (App. E, p. 61).

On March 23, 1966 the Company explained that after reconsideration it had determined not to cancel the retirees' health insurance plan. Instead, it would give each of the retired employees a chance to withdraw his participation in the Union-negotiated health insurance plan, in which event the Company would contribute $3.00 per month toward the retiree's payment of supplemental Medicare benefits (App. D, pp. 26, 27). The Union objected to the Company's proposal and asked that it bargain about these changes in the retirees' negotiated program. The Company refused. On March 24 the retirees were advised by mail of the Company's new program and that their enrollment for their Medicare supplemental benefits must be completed by March 31, 1966. Fifteen of the 190 retired employees cancelled their participation in the negotiated health insurance plan (App. D, p. 27; App. A, p. 4).

B. THE BOARD'S DECISION AND ORDER.

On the basis of the foregoing facts the Board (one member dissenting) reversed its trial examiner who had recommended dismissal of the complaint.[3] It found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union about changes in benefits of employees previously retired from the collective bargaining unit, and who since their retirement had been the beneficiaries of a negotiated retirement plan; and also, by unilaterally changing insurance benefits of retired employees without first negotiating with the Union (App. D, pp. 47, 48).

The Board ordered the Company to cease and desist from the unfair labor practices found, and upon the Union's request to rescind any adjustment in the negotiated insurance plan for the retired employees (App. D, p. 48).

C. THE DECISION OF THE COURT OF APPEALS.

The court of appeals refused to enforce the Board's order. Based on the facts found by the Board, which it did not disturb, it held that retirees are not employees under Section 8(a)(5) of the Act and employers are under no statutory duty to bargain collectively with unions about improvements in pension and insurance benefits of their retired employees (App. A, p. 10). The court also rejected the Board's finding that the Company unilaterally changed the negotiated insurance benefits of its retired employees (App. A, p. 11).

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[3] The trial examiner found that the Company "refused to meet and confer with the Union regarding changes unilaterally * * * made" by the Company. Nevertheless, under his interpretation retired employees were not covered by the Act. Therefore the Company was not obligated by the statute to bargain with the Union concerning a change in their negotiated benefits (App. E, pp. 63, 64; App. D, p. 27).

REASONS FOR GRANTING THE WRIT.

1. This case presents for the first time in over 30 years of statutory interpretation, the issue of whether employers are subject to the requirement of the Act that they bargain with incumbent unions about health plans and pension benefits of their retired employees (App. D, p. 29).[4]

The court of appeals' interpretation of the statute cannot be reconciled with this Court's decision in *Teamsters Union v. Oliver*, 358 U.S. 283 (1958). At issue in *Oliver* was the question of whether the fixing of a minimum rental to be paid by an employer for leased vehicles to be driven, not by his employees, but by their owners, could be subjected to collective bargaining. This Court recognized that the inadequacy of a rental paid to an owner-operator "not only clearly bears a close relation to labor's efforts to improve working conditions, but is in fact of vital concern to the carrier's employed drivers," *Teamsters Union v. Oliver, supra,* at 294. Bargaining about changes in the benefits of retired employees is of no less concern to the active employees than the adequacy of a rental to be paid the owner-operators in *Oliver*.

Active employees are vitally concerned with the level of benefits established for the retirees and that the benefits negotiated will be received. The court of appeals agreed with the Board that both the Union and active employees have a "legitimate interest" in the fulfillment of negotiated contracts protecting retirees, and active employees also have a "selfish" interest about bargaining for

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[4] The Court of Appeals accepted without dispute the principle that pensions and insurance benefits enjoyed by employees after retirement are mandatory subjects of bargaining, *Inland Steel Company*, 77 NLRB 1, enfd. 170 F. 2d 247 (CA-7, 1948), cert. denied 336 U.S. 960; *W. W. Cross & Co.*, 77 NLRB 1162, 1163-1164, enfd. 174 F.2d 875; 877 (CA-1).

retirement benefits since these benefits are "an integral part of their total compensation" (App. A, p. 17). It could not square its agreement, however, with the Board's holding that a change in the retirement benefits of the retirees was a mandatory subject of bargaining. It was the court's opinion that retirees are not "employees" within the meaning of Section 8(a)(5) of the Act.

This Court's decision in *Oliver,* however, was in no way dependent on any determination that owner-operators were "employees" within the meaning of the Act. Mr. Justice Brennan, the author of the Court's opinion, later explained:

> "*Local 24 of Intern. Broth. of Teamsters, etc. v. Oliver,* 358 U.S. 283, 79 S. Ct. 297 * * * did not, as appellees suggest * * *, hold that owner-operators are in any sense 'employees.' That case held that a bargaining unit including an overwhelming majority of concededly employed drivers of carrier-owned equipment was entitled under § 8(d) of the National Labor Relations Act * * * to bargain to impasse concerning minimum rentals to be received by owner-drivers. It was not necessary to determine whether the owner-drivers were 'employees' protected by the Act, since the establishment of the minimum rental to them was integral to the establishment of a stable wage structure for clearly covered employee-drivers. * * *." (*United States v. Drum,* 368 U.S. 370, 382, n. 26.)

The decision below that because retirees are not "employees" within the meaning of the Act, a change in their benefits could not be made the subject of mandatory bargaining, is in conflict with this Court's decision in *Oliver.*

In *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958), this Court said that one of the tests to be used in determining whether a subject of bar-

gaining is mandatory is whether the subject matter sought to regulate relations between the employer and employees. The Board pointed out in *Houston Chapter, Associated General Contractors,* 143 NLRB 409, 412 (1963), that in this regard "we do not deem the Supreme Court to have limited its definition of 'employee' to those individuals already working for the employer."

The court of appeals noted, "the evidence in the *amicus curiae* briefs tending to show that the practice in industry is to bargain on retired employees' benefits" (App. A, p. 20).[5] It characterized this tendency as a demonstration of "the increasingly humanitarian quality of the labor management relationship" (App. A, p. 20). The court's observation misses the point. Industry practice is significant not as a humanitarian quality but because the statutory requirement that parties "bargain collectively * * * generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States" *Telegraphers vs. Railway Express Agency,* 321 U.S. 342, 346 (1944).

The impact of Medicare upon negotiated benefits is one of the latest factors which affects the retired worker and required the Union to review constantly the pension and old age insurance benefits. Medicare unsettled retirement benefits which the parties had agreed to in 1964. Private programs had to be coordinated with various federal and state programs so that duplication of benefits was avoided and adequate coverage assured. The

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[5] The extent of the practice is revealed in part by figures which show 26 million workers are covered by collective bargaining plans negotiated between management and labor. *Social Security Programs in the United States,* U. S. Dept. of Health, Education and Welfare, Social Security Administration, Wash. 1968, p. 16.

scope of the benefits for individuals 65 years of age or over suggests strongly the necessity to mesh these public law benefits with any private insurance plan. 42 U.S.C. 1395k. A union's role is not lessened because the retiree is no longer on the active payroll. On the contrary, a union's role is broadened because of the changed status of the retiree.

The decision of the court below conflicts in principle with this Court's holding in *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203 (1964). The court erroneously narrowed the Board's interpretation of the Act to a point inconsistent with its statutory purpose and contrary to the intent of Congress. It ignored what this Court said in *Fibreboard*, that refusals to bargain "had been one of the most prolific causes of industrial strife," and that bringing within the framework of collective bargaining subjects which reflect the industrial practices of the country was "most conducive to industrial peace," *Fibreboard Paper Products Corp. v. N.L.R.B., supra*, at 211. Experience indicated to this Court that "contracting out in one form or another has been brought, widely and successfully, within the collective bargaining framework," *Fibreboard Paper Products, supra*, at 211. The purpose of the statute is to reduce the area of conflict without setting "precise outside limits to the subject matter properly included within the scope of mandatory collective bargaining," *International Teamsters, etc. v. Oliver*, 258 U.S. at 294.

In *Houston Chapter, Associated General Contractors, supra*, at 413, the Board noted that "[a]s the relationship between employers and employees evolves, new areas may be found which affect 'wages, hours, and other terms and conditions of employment,' and thus the list of mandatory subjects of bargaining quite properly is enlarged."

2. In yet another respect, the lower court's decision is contrary to accepted judicial construction of Section 302 (c) of the Act by the Eighth and Ninth Circuit Courts of Appeals. Those courts have held that the term "employees of such employer" in Section 302(c)(5) includes both "current employees and persons who were current employees but now retired," *Blassie v. Kroger Co.*, 345 F.2d 58, 70 (CA-8, 1965); *Local No. 688, International Bro. of Teamsters v. Townsend*, 345 F.2d 77 (CA-8, 1965); *Garvison v. Jensen*, 355 F.2d 487 (CA-9, 1966). The lower court was "unpersuaded" by the decision in *Blassie* because it involved a construction of Section 302 of the Act, a criminal provision prohibiting employer payments to a union unless brought within the exceptions of Section 302(c)(5). This latter provision permits employer contributions to trust funds for the exclusive benefit of employees and retirees, whereas the instant case dealt with the word "employee" as it appears in Section 8(a)(5) of the Act.

In the *Blassie* case the court of appeals reversed the district court which had enjoined trustees from expending trust assets for the benefit of persons who were retired employees of a contributing employer. It refused to accept the district court's construction that the statute restricted current enjoyment of benefits "to persons in active employment." It said:

> "(c) * * * the presence of these two requirements—payment by the employer and current employment—does not mean that benefits which flow from these contributions of the employer (and from any other receipts of the Trust) are to be confined in their enjoyment to the period of the employee's active employment. There is nothing in the statute which clearly proscribes this and we see nothing in its

language which could support so restrictive an inference."

In *Garvison v. Jensen,* 355 F.2d 487, the Ninth Circuit held that a pension and welfare fund created as a result of collective bargaining was not invalid because previously retired employees were entitled to benefits.

3. The second question presented deals with the Board's finding that the Company unilaterally changed its medical insurance plan for retired employees (App. D, p. 47). The lower court erroneously confused the issue by holding that this was "not the case of an employer unilaterally abrogating contractually vested retirement benefits of retirees" or of an employer "bypassing the union and bargaining directly with active employees" (App. A, p. 10). The Company, as both the trial examiner and Board found, refused to confer with the Union about changes and required retirees to remain in the negotiated plan or withdraw and enroll in supplemental Medicare. The lower court's holding conflicts with this Court's decision in *N.L.R.B. v. Katz,* 369 U.S. 736, 743 (1962), that an employer's unilateral change in a negotiated insurance plan violates the statute. See *N.L.R.B. v. General Electric Co.,* 418 F.2d 736 (1969), cert. denied, 90 S. Ct. 995, 90 S. Ct. 1352.

4. The questions posed by the instant case involve a fundamental interpretation and application of the national labor law and are of far-reaching importance to both industry and labor. The lower court recognized the importance of the questions raised as to the scope of Section 8(a)(5) of the Act when it said:

"The facts which are essentially undisputed, raise a question of first impression, so far as we are able to determine, before this or any other court under the

National Labor Relations Act, as amended." (App. A, p. 2).

The increase in union welfare activity and in the number of employer-sponsored benefit and medical insurance plans has greatly accelerated health and welfare bargaining.[6] The court of appeals stated that the "purpose of federal labor legislation * * * [was] to reconcile, and * * * equalize the power of competing economic forces within the society in order to encourage the making of voluntary agreements * * *" (App. A, pp. 18, 19). It also stated that "[r]etired employees have no economic or bargaining power within this system" (App. A, p. 19). Thus, to remove from the area of mandatory bargaining the subject matter of negotiating benefits for those who as individuals "have no economic or bargaining power" does not "reconcile" or "equalize" and means that a constantly growing group of individuals will have no representation at all.

The decision below will encourage refusals to bargain about health care. Settlement of a matter of this importance in the administration of the Act is plainly in the public interest and can only be resolved by action of this Court.

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[6] Munts, *Bargaining For Health* (1967); *Private Health Insurance and Medical Care, Conference Papers,* U. S. Dept. of Health, Education and Welfare, Social Security Administration (1968).

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 26, 1970.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

NO. 961

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Pursuant to Rule 42 of the Rules of this Court the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the International Union UAW, hereby move for leave to file a brief *amici* in support of the Petition. The Solicitor General has granted his consent. Counsel for the Company has refused his consent.

INTEREST OF THE AMICI

The AFL-CIO is a federation of one hundred and twenty-one affiliated labor organizations having a total membership of approximately thirteen million working men and women. It is thus the majority spokesman for organized labor. The International Union UAW, with a membership

of over one million five hundred thousand is the nation's largest industrial union.

The instant case presents a major question as to the proper scope of bargaining on a basic issue—retirement benefits. Both management and organized labor have so recognized even before the National Labor Relations Board's decision. This recognition has led to extensive *amicus* presentations. The Chamber of Commerce, the National Association of Manufacturers, the AFL-CIO, the UAW, the United Steelworkers and the Amalgamated Transit Union all sought and were granted permission to file briefs *amici* with the NLRB, and all of the above with the exception of the AFL-CIO participated in the court below.

This major question has been erroneously decided. The nature of the subject matter demands that bargaining over retirement benefits be a continuous process. The lower court's opinion (Pet. App. 1-20),[1] however, creates an artificial restriction on bargaining which will have a substantial adverse practical impact on labor-management negotiations involving this subject. The decision below is also unsound in its overall approach. It pretermitted bargaining covering a subject of importance to employees within the unit, with the acknowledged representative of those employees, because it was determined that the result would have an impact on other persons. If this view gained acceptance countless subjects of discussion important to labor and management will be removed from the bargaining table if either party declines to discuss it, thereby narrowing the scope of bargain-

[1] The union immediately involved in the instant case, Local 1, Allied Chemical and Alkali Workers of America, has filed a separate Petition For A Writ Of Certiorari, No. 910, this Term. To avoid needless duplication the Appendix references in the Board's Petition are to the Appendix in No. 910 (Pet. 1, n. 1). The same practice is followed here.

ing to a point at which the ultimate aims of the Act would be thwarted.

Collective bargaining is the primary function of the Federation's affiliates and the UAW. Thus the *amici's* interest in the instant proceeding is manifest. And it is precisely because of the scope and depth of that interest that the AFL-CIO and the UAW take the extraordinary step of seeking this Court's leave to present their views.

ISSUE NOT COVERED IN THE PETITION

One of the major factors to be considered in determining the proper scope of collective bargaining is industrial practice. The salutary impulse in this area has been to consult the realties of bargaining rather than definitional abstractions: "The term 'bargain collectively' as used in the Act 'has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States.'" *Labor Board* v. *American National Insurance Co.*, 343 U.S. 395, 408. Recognizing this, the union presentations below concentrated on developing data as to present practice. This data is relied on in the Board's decision (Pet. App. 42). The brief *amici* tendered herewith collects and updates in a single brief the materials presented in separate briefs below. For these facts are highly relevant in understanding the dynamics of collective bargaining on retirement benefits, and are not developed in the Petitions already filed.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying brief *amici* in the instant case in support of the Petition For A Writ Of Certiorari To The United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted

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In the Supreme Court of the United States

OCTOBER TERM, 1970

NO. 961

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND FOR THE INTERNATIONAL UNION UAW AS AMICI CURIAE

This brief *amici* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO, and the International Union UAW, contingent upon the Court's granting the foregoing Motion For Leave To File A Brief As *Amici Curiae.*

The opinions below, the basis of this Court's jurisdiction, the questions presented, and the statutory provisions involved are set out on pp. 1-2 of the Petition.

The interest of the AFL-CIO, and of the UAW, is set out on pp. iii-iv of the above noted Motion.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW, WHICH IS IN CONFLICT WITH DECISIONS OF THIS COURT, WILL HAVE AN ADVERSE IMPACT ON MILLIONS OF ACTIVE WORKERS AND RETIREES

1. It has been settled for over 20 years that employers are required to bargain with the representative of their employees with respect to pensions and other retirement benefits payable to those employees; see, *Inland Steel Co.*, 77 NLRB 1, *enforced* 170 F.2d 247 (C.A. 7) *certiorari denied on this point,* 336 U.S. 960. Organized labor has utilized this bargaining right to the fullest:

> "By the end of 1966 * * * 14 million [workers in private industry] were covered by negotiated retirement plans. * * * Of the estimated 17.8 million non-government workers under union contracts in 1966, * * * 3 out of 4 [had] retirement plan coverage." D. Kittner, *Negotiated Health and Retirement Plan Coverage,* 91 Monthly Labor Review 24 (Dec., 1968) [1]

The resulting extensive system of retirement benefits, which operates in tandem with the broad public commitment to the retired embodied in Social Security and Medicare legislation, has been developed despite frequently intense employer resistance. Unions have insisted on such benefits, even at the cost of increases in immediate wage payments because of their view that the rigors of industrial life must be tempered by the expectation of a retirement in dignity and economic security.

Due to the increase in life expectancy, the ranks of the retired grow constantly. The level of income and health

[1] In the Petition in No. 910, p. 9, n. 5, the number of workers in private industry covered by negotiated plans is erroneously given as 26 million. That figure includes both negotiated and non-negotiated plans.

benefits available to them is of importance not only to these millions of individuals and their families, but to the general public, as Congress has recognized by periodically raising social security benefits and by adopting and expanding Medicare. These legislative improvements do not, however, fully meet the needs of the retired. For the premise of public policy is that the private economy—specifically the employing entity which benefited from the worker's productive years—will pay a significant portion of the cost. In unionized plants collective bargaining is the dominant method for determining the employer's contribution, consistent with the basic policy declared in § 1 of the National Labor Relations Act—to encourage "the practice and procedure of collective bargaining."

The instant case is the first since *Inland Steel* to raise a basic question about the scope of the duty to bargain about retirement benefits. The resolution of the question presented will go far to determine whether meaningful implementation of the basic principle that retirement benefits are a mandatory subject of bargaining will continue. Both management and organized labor so recognized even before the National Labor Relations Board decision herein. And both sides made unusual efforts to insure that the Board was fully informed as to current practice rather than following the usual course of leaving it to the Board to invite briefs or to rely exclusively on its own knowledge of industrial relations. After the Trial Examiner's decision was rendered, the Chamber of Commerce filed a motion for leave to file a brief *amicus curiae* with the Board, stating:

> "This case, if decided in the manner advocated by the General Counsel, would have a substantial impact on every union and employer covered by the Act."

The National Association of Manufacturers also filed a brief with the Board on behalf of management. And the

AFL-CIO, the UAW, the Steelworkers, and the Amalgamated Transit Union, each of which was directly affected, all filed briefs *amicus* on behalf of organized labor. The Board expressly relied on the union briefs in determining that "Bargaining on benefits for workers already retired is an established aspect of current labor-management relations" (Pet. App. 42).

2. The impact of the instant case stems from the fact that pursuant to present "industrial bargaining practices," *Fibreboard Paper Products Corp.* v. *Labor Board*, 379 U.S. 203, 211, negotiation of retirement benefits is a continuous process:

> "Of the 976 major contract settlements concluded in 1966 that involved wages, almost 58 percent liberalized health and insurance plans and almost 44 percent liberalized retirement plans. As a result of these settlements * * * retirement plan provisions were changed in contracts covering over 1.7 million workers.
>
> "Liberalization of health and insurance plan provisions involved * * * the extension of benefits to retired workers and their dependents, and the adaptation of benefits for retirees and other elderly participants of Medicare. * * *" D. Kittner, *op. cit. supra.*, 91 Monthly Labor Review at 24.

As noted in S. Rep. No. 404, Part I, 89th Cong., 1st Sess., 23-24 (1965), the practice of extending "benefit liberalizations to existing pensioners on the rolls when doing so for future pensioners [is] often followed under private pension plans." To illustrate this point, we have prepared, from 1970 data published by the Department of Labor, an Appendix to this brief setting out a cross-section consisting of 20 major contracts (i.e., contracts covering between 600 and 35,000 employees) in which there were changes in benefits of persons already retired. These contracts were negotiated by 15 international unions and were selected to provide the court with a cross-section of industries and geographic

regions, and they demonstrate that continuous collective bargaining over retirement benefits is a common-place, see pp. 17-22 *supra*.[2]

The results of this continuing process of bargaining were illustrated by the UAW and the Steelworkers, the two largest industrial unions in the country, in briefs *amicus* to the Board and the court below. In the 1964 negotiations between the UAW and the major employers in the automobile industry, improvements were negotiated in both pension and health and welfare benefits of employees who were, at the time of negotiations, already on retirement: (1) the increases in the monthly pension of $1.45 a month per year of service was made applicable to all previous retirees; (2) new health benefits were made applicable to retirees and their spouses, as well as to employees and families, including (and of particular importance to retirees), convalescent and long-term illness care providing up to 730 days in an approved nursing home; (3) health insurance premiums for retirees would henceforth be paid entirely by the companies rather than shared 50-50 by the retirees. Brief *Amicus Curiae* (on behalf of UAW) pp. 11-13. Further benefits for persons already retired were negotiated by UAW in the automobile industry in the 1967 negotiations, and in the negotiations just concluded with General Motors the UAW secured the following major benefits for retirees: (1) an increase of $1 a month per year of service; (2) a plan pursuant to which prescriptions would be filled at a maximum charge of $1 to $2 per prescription; (3) an agreement pursuant to which G.M. would pay Medicare premiums in their entirety. These gains were made despite the fact that G.M.'s "final offer" did not provide a single benefit for those already retired.

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[2] A similar study utilizing earlier data was presented to the Board in the AFL-CIO's Brief *Amicus Curiae*.

And the Steelworkers advised the court below:

> "In the steel and iron ore industries, improved pension and/or insurance benefits for employees retired resulted from collective bargaining in 1954, 1956, 1960, 1965 and 1968; in the aluminum industry, improvements for those already retired were gained in 1949, 1956, 1960, 1962, 1965 and 1968; and in the can industry, in 1955, 1959, 1962, 1965 and 1968. A similar bargaining history prevails in other industries whose employees are represented by the USW." Brief for United Steelworkers of America, AFL-CIO, as *Amicus Curiae*, p. 3.

The process of continuing negotiation is not a mere convenience, it is a necessity. As was recognized in *Inland Steel*, 170 F.2d at 253, the very nature of retirement benefits is that they constitute future compensation for work performed. The actual value of those future benefits to the retiree when he becomes entitled to them is dependent upon many conditions and circumstances which the bargaining parties cannot anticipate and over which they have no control.

Monetary inflation is one of these. Public law is another. It would not be even theoretically possible for unions and employers to anticipate the nature and level of public benefits which retirees can expect and duplication of which would create costs to the employer without commensurate value to the retiree. Who, for example, in negotiating retirement benefits during, say the first 10 years after *Inland Steel*, could have anticipated the enactment of Medicare or its precise form; and who can tell today how much Social Security eligibles will receive monthly in 1980? To expect the parties to plan for such contingencies is, in Justice Holmes' words "to exact gifts that mankind does not possess," *International Harvester Company* v. *Kentucky*, 234 U.S. 216, 224. And so, since collective bargaining is

governed by industrial realities rather than definitional abstractions, the practice of unions and employers in negotiating retirement benefits is to adjust to changing conditions.

For example, pensions are usually negotiated as a fixed monthly payment. Thus, the amount of goods and services which the retiree can obtain fluctuates with the real value of the dollar. It is notorious that pensions are peculiarly vulnerable to the rising cost of living. To compensate for the inroads of recent inflation, the steel industry agreements increased pensions for those already retired $5.00 per month in 1965, and another $10.00 per month in both 1965 and 1968.

Moreover, there is an intimate and an unavoidable interrelationship between negotiated benefits, and those which the retirees receive by virtue of public law. The precise nature and dimension of the periodic shifts in Social Security payments and Medicare benefits cannot, of course, be anticipated, yet it would most certainly be counter-productive if private and public plans looking toward the same end failed to mesh.

Looking again to the experience of the Steelworkers, at the time Medicare was enacted there were agreements in force in the aluminum and can industries, which had been negotiated prior to enactment, requiring employers to provide hospital and surgical insurance to retired employees. The new public law provided some of the same coverage. This meant that the private programs would be paying the retirees a second time for expenses already covered. Not surprisingly, these employers immediately insisted on negotiating adjustments with the union to avoid having to pay for this duplicative coverage. On the other hand, Medicare also contained certain features which motivated the union to obtain changes for the benefit of

retirees. The provision that the supplemental statutory coverage under Medicare could only be obtained by the payment of premium stimulated efforts by the Steelworkers which led to an agreement pursuant to which employers pay this cost which would otherwise have been borne by their retirees.

While the Board properly relied on the information it thus received from the briefs *amici* (see, e.g., *Fibreboard Paper Products Corp.* v. *Labor Board,* 379 U.S. 203, 212, n. 7, 216, n. 8; *Vaca* v. *Sipes,* 386 U.S. 172, 192, n. 15), the impact of legislation on the benefits previously agreed upon is shown by this very case, and acknowledged by the company. The entire controversy, including the unilateral changes made by the company, was triggered by the enactment of Medicare. To some extent the parties had anticipated this legislation in their agreement, providing that the company would have the right to reduce its contribution for insurance to retirees (Pet. App. 25). The company exercised this right during the term of the agreement and the union acquiesced (*ibid*). But the company also stated, as the Board found (*id.* at 26), that it intended to cancel the negotiated health insurance plan for retired employees because, in "*respondent's opinion the enactment of Medicare made this insurance useless.*" (emphasis supplied.)

Government action may also affect pension arrangements. The 1949 pension plan in the steel industry provided that a retiree would receive a total pension of at least $100 per month, including Social Security. The average Social Security benefit at that time was approximately $65 per month, so that the employers were undertaking an additional liability of at least $35 per month. In subsequent years, however, Congress amended the Social Security Act to increase the monthly payment. Under the terms of the pension plan, this resulted in a reduction in the amount of

pension paid by the employers to those who had already retired. This unanticipated development impelled the union to seek revisions of the plan to reinstate its original intent. In 1954, as a stopgap measure, the Steelworkers won agreement that subsequent increases in Social Security would not result in further reduction of retirees' pensions. In 1956, the union obtained a general revision of the formula for computing retirees' minimum pensions which eliminated the Social Security offset altogether. Had the Steelworkers not been entitled to renegotiate the pension formula for retirees, the unanticipated amendments to the Social Security Act would have rendered a plan which had been progressive in 1949, when it was negotiated, regressive in its application due to subsequent legislation.

Finally, it should be noted that the employer's promise to pay pension benefits is only the first half of the matter. It is also essential that adequate monies to pay the monthly pension benefits be available as they come due. The traditional mechanism for financing pensions is the "pension fund," to which the employer makes periodic contributions. Because most collective bargained pensions plans give the employer considerable time to reach complete funding (the median period is approximately 30 years), it is almost invariably true that at the moment an employee retires the employer will not have yet contributed the full amount necessary to pay his pension for the rest of his life. Normally the employer anticipates contributing to the fund on a regular basis to provide the monies to pay that pension. Periodic reviews of the financial health of the pension fund are therefore essential to assure that it will be adequate to provide pension payments as they come due. After such a review the union may conclude that an employer's rate of contribution is too slow, or the union may find that the investment of pension monies has resulted in losses. If

these eventualities arise the union may, through bargaining, insist on requiring an additional contribution.

The fact that every contribution the employer makes goes into a single fund, from which benefits will be paid to eligible retirees, regardless of whether they were active or retired at the time the payments were made, is perhaps the most strking evidence of the artificiality of the view of bargaining adopted below (Pet. App. 1-20). The size of the employer's contribution is his main stake in the amount of benefits and in establishing eligibility—it is, in a word, his cost. Yet until the time that the plan is completely funded, it is a logical impossibility to bargain about that contribution without bargaining about the interests of persons already retired. Only after funding is complete does every cent contributed go to provide payments to persons presently employed—and then only if the benefits of those already retired remain constant.

The sum of the matter, as the Board stated, is that:

> "Forced reliance on fixed, preretirement formulas has shortcomings which may lead to disappointing results in the operation of a plan. There may be a variety of changes in the experience of the covered group or in the operation or administration of the plan itself which the parties cannot foresee. The changing value of the dollar, rising medical costs, and other economic developments might alter the real level of benefits envisaged by the original formula. The parties may also reappraise their feelings as to the fair economic share owing to retired workers, just as society itself periodically reexamines its commitments to the elderly. In addition, insurance and health care plans are constantly developing new features and refinements.
>
> • • •
>
> "With respect to new problems which arise under a health insurance plan for retired employees, collective bargaining is not only a suitable method for exploring

different solutions, but it is probably the most rational and effective method. A plan which has its inception in the collaborative process of a labor-management agreement reflects the assumptions, arguments, and aspirations—as well as the compromises—of the parties to that process. While the process of collective bargaining does not guarantee that its agreements will be wise, the process does help to assure the acceptability of those agreements because they were reached through the participation and the commitment of the parties most affected. Moreover, to deny collective bargaining a role in the development of health benefits plans for retired employees might undermine their viability." (Pet. App. 40-41.)

3. As an "independent" ground for its decision, the Board concluded that the subject of retirement benefits for retired employees is embraced by the bargaining obligation of the statute because it vitally affects active bargaining unit employees" (Pet. App. 37). This is the precise method for determining the scope of the mandatory obligation under § 8(d) which this Court utilized in *Teamsters Union* v. *Oliver,* 358 U.S. 283 and *Fibreboard Paper Products* v. *Labor Board,* 379 U.S. 203. In reversing the Board, the court below addressed itself only in passing to this independent ground of the Board's decision, and without giving a factual explanation therefor, asserted that bargaining about this subject was "not necessary" to protect the interests of bargaining unit employees.

It would be ground for review and reversal that the Court of Appeals should thus substitute its own *ipse dixit* for the reasoned conclusions of the Board on a matter so "peculiarly within the cognizance of the Board because of its closeness to and familiarity with the practicalities of the collective bargaining process," *cf. Carpenters Union* v. *Labor Board,* 357 U.S. 93, 106. In any event, as we explained above, the Board's assessment of the impact of this subject

on active employees is correct. This being so, the decision below is clearly inconsistent with *Fibreboard* and *Oliver*.

In *Fibreboard* this Court held (379 U.S. at 215) "that the type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d)." In reaching this conclusion heavy reliance was placed on *Oliver*, which was described as follows (*id.* at 212-213):

> "The issue in that case was whether state antitrust laws could be applied to a provision of a collective bargaining agreement which fixed the minimum rental to be paid by the employer motor carrier who leased vehicles to be driven by their owners rather than the carrier's employees. We held that the agreement was upon a subject matter as to which federal law directed the parties to bargain and hence that state antitrust laws could not be applied to prevent the effectuation of the agreement. We pointed out that the agreement was a
>
> > 'direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract. The inadequacy of a rental which means that the owner makes up his excess costs from his driver's wages not only clearly bears a close relation to labor's efforts to improve working conditions but is in fact of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service.' (358 U.S. at 294).
>
> Thus, we concluded that such a matter is a subject of mandatory bargaining under § 8(d)."

Accordingly, the Board's conclusion that retirement benefits for retired employees are encompassed within the duty

to bargain because they vitally affect active employees was sound, and was alone sufficient to require enforcement of its order.'

The court below, however, was of the view that if the retirees are not employees or are not in the bargaining unit, an employer cannot be required to bargain about their benefits. (Pet. App. 15-18). This purported restriction on the bargaining obligation is conclusively refuted by *Oliver* which was subsequently explained by its author, Mr. Justice Brennan, in terms which are particularly instructive here:

> "*Local 24 of Inter. Broth. of Teamsters, etc.* v. *Oliver*, 358 U.S. 283, did not, as appellees suggest * * *, hold that owner-operators are in any sense 'employees.' That case held that a bargaining unit including an overwhelming majority of concededly employed drivers of carrier-owned equipment was entitled, under § 8(d) of the National Labor Relations Act, * * * to bargain to impasse concerning minimum rentals to be received by owner-drivers. It was not necessary to determine whether the owner-drivers were 'employees' protected by the Act, since the establishment of the minimum rental to them was integral to the establishment of a stable wage structure for clearly covered employee-drivers. See *id.*, at 294-295." *United States* v. *Drum*, 368 U.S. 370, 382, n. 26.

Similarly, it is not necessary to determine in this case whether retirees are employees protected by the Act, since the establishment of their benefits is "integral to the establishment of" retirement benefits of active employees.

4. The decision below is not only erroneous in terms of the precise issue presented, it is also unsound in its overall approach. Yet the lower court's opinion stated, "Not only are the Board's arguments without support in the language of the Act, they are in defiance of its purpose." (Pet. App.

18). Putting aside questions of the proper interpretation of the language of §§ 2(3), 8(a)(5), and 9(a), it is clear that it is the court's decision rather than that of the Board which is "in defiance of [the Act's] purpose." For the court's opinion gives no weight to, and its conclusion frustrates, the Act's dominant purpose—"to encourage the practice and procedure of collective bargaining." This objective was first enunciated in the Wagner Act and consciously reaffirmed in the Taft-Hartley Act. In *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42, Mr. Chief Justice Hughes said:

> "Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances."

And again, in *Fibreboard,* Mr. Chief Justice Warren said:

> "The inclusion of 'contracting out' within the statutory scope of collective bargaining also seems well designed to effectuate the purposes of the National Labor Relations Act. One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation. The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42-43. To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management

within the framework established by Congress as most conducive to industrial peace." 379 U.S. at 211-212.[8]

The court below, however, substituted for the broad policy favoring collective bargaining about a subject where this process has worked in practice, a hypertechnical approach which looks only to the definitions of "employee" and "unit for bargaining." On this view, bargaining covering a subject of importance to employees within the unit, *with the acknowledged representative of those employees,* was pretermitted because it was determined that the result would have an impact on other persons. If this view gained acceptance—and the decision will doubtless encourage other employers to experiment with avoidance of their bargaining obligations—countless subjects of discussion important to labor and management will be removed from the bargaining table if either party declines to discuss it, thereby narrowing the scope of bargaining to a point at which the ultimate aims of the Act would be thwarted.

[8] We note that the question which divided the Court in principle although not in result in *Fibreboard* is not presented here. Neither Pittsburgh Plate Glass nor any of the management *amici* have contended at any time that benefits to retirees are inherently a management function, or that these are a matter peculiarly internal to the company such as its relations with its own stockholders. Cf. *Labor Board* v. *Borg-Warner,* 356 U.S. 342.

CONCLUSION

For the above noted reasons, as well as those stated by the National Labor Relations Board, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November, 1970

APPENDIX

CHANGES IN BENEFITS FOR RETIREES BROUGHT ABOUT BY COLLECTIVE BARGAINING

1. PENSION BENEFITS

UNION	COMPANY	LOCATION	DATE CONTRACT EFFECTIVE	NO. OF WORKERS	DESCRIPTION OF PROVISION	SOURCE, U.S. DEPT. LABOR CURRENT WAGE DEVELOPMENTS
Oil, Chemical and Atomic Workers	The Carborundum Company	Niagara Falls, New York	7/21/69	2,600	$5 monthly pension for each year's credited service prior to 7/1/68 & $6 a month for each year thereafter (was $3 a month for all years)	No. 265 p. 7 Jan. 1, 1970
UE	I-T-E Imperial Corp. (formerly I-T-E Circuit Breaker Co.)	South Greensburg, Pennsylvania			$10 a month increase in present retirees' pensions	No. 265 p. 11 Jan. 1, 1970

UNION	COMPANY	LOCATION	DATE CONTRACT EFFECTIVE	NO. OF WORKERS	DESCRIPTION OF PROVISION	SOURCE, U.S. DEPT. LABOR CURRENT WAGE DEVELOPMENTS
IAM	Ladish Co.	Cudahy, Wis.	2/13/70	2,000	Effective 4/1/70 $5 monthly normal pension rate (was for $4) for active and retired employees	No. 273 p. 18 Sept. 1, 1970
UAW	Scovill Mfg. Co.	Waterbury, Waterville, & New Milford, Connecticut	10/69		Pension rate for previous retirees increased to $4.50	No. 266 p. 15 Feb. 1, 1970
Oil, Chemical and Atomic Workers	E. R. Squibb & Sons, Inc.	Brooklyn, N.Y. & New Brunswick, N.J.	10/69	2,500	20% increase for employees who retired prior to 1/1/70	No. 267 p. 7 Mar. 1, 1970
IUE	Electric Machinery Mfg. Co.	Minneapolis, Minn.			Current retirees received 10% increase in pensions.	No. 270 p. 17 June 1, 1970
United Rubber Workers	Goodyear Tire & Rubber Co. (16 plants)	Various	6/70	23,000	Present retirees pension increased by $1.25 a month for each year's credited service	No. 271 p. 9 July 1, 1970

IBEW; IUE; IAM; CWA; Steelworkers; Teamsters	Sylvania Electric Prod. Inc. (hrly. empls.)	Ipswich, Salem & Danvers, Mass.; Seneca Falls, Batavia & Buffalo, New York; Williamsport, Muncy, Warren & Titusville, Pa.; Smithfield, N.C.; Wheeling, W.Va.; and Ottawa, Ohio	6/15/70	10,000	Benefit rate for earlier service increased by $3.50	No. 271 p. 10 July 1, 1970
UAW	Torrington Co., a subsidiary of Ingersall-Rand Co.	Torrington, Conn.	5/70	2,500	Present retirees pension rate increased to $3.50 a month	No. 271 p. 14 July 1, 1970
IUE	Philco-Ford Corp., a subsidiary of Ford Motor Co.	Philadelphia, Pa., area	4/70	2,700	10% increase in present retirees' pensions	No. 271 p. 16 July 1, 1970
UE	Allen-Bradley Co. (electric motor controls & electronic components)	Milwaukee, Wis.		5,200	Improved pensions for current & future retirees increased $4 a month minimum benefit rate (was $2.50)	No. 271 p. 20 July 1, 1970

UNION	COMPANY	LOCATION	DATE CONTRACT EFFECTIVE	NO. OF WORKERS	DESCRIPTION OF PROVISION	SOURCE, U.S. DEPT. LABOR CURRENT WAGE DEVELOPMENTS
Pulp, Sulphite & Paper Mill Workers; United Papermakers & Paperworkers; IBEW	Int'l. Paper Co. Southern Kraft Division	South Carolina, Alabama, Miss., Florida, Arkansas, Louisiana	6/70	11,500	Increase in monthly pension for current & future retirees;	No. 272 p. 9 Aug. 1, 1970
UE	Morse Cutting Tools (formerly Morse Twist Drill & Machine Co.)	New Bedford, Mass.	5/8/70	850	Increased pensions for current retirees	No. 272 p. 14 Aug. 1, 1970
IUE	Reliance Electric Co.	Cleveland & Ashtabula, Ohio	6/70	1,600	Increased pensions for present retirees	No. 272 p. 18 Aug. 1, 1970

2. HEALTH AND WELFARE BENEFITS

Retail, Wholesale & Department Store Union	Detroit milk companies	Detroit, Mich., area	11/69	1,050	Companies pay $2 a month toward retiree's hospital-medical insurance (was $1.50)	No. 266 p. 8 Feb. 1, 1970

United Papermakers & Paperworkers	Westvaco Corp. (formerly West Virginia Pulp & Paper Co.)	Covington, Va.; Luke, Md.; & Williamsburg, Pa.	11/69	3,000	$4,000 retiree life insurance (was $1,000)	No. 266 p. 10 Feb. 1, 1970
UAW	Scovill Manufacturing Co.	Waterbury, Waterville, & New Milford, Conn.	10/69		$2,000 retirees life insurance (was $1,000)	No. 266 p. 15 Feb. 1, 1970
IUE	Fedders Corp. (appliances)	Edison, N.J.	2/23/70	2,200	Company pays amount equal to 10% of cents-per-hr. contribution for additional disability & vesting benefits, life insurance, & disability benefits for employees & retirees	No. 267 p. 9 & 10 Mar. 1, 1970
Int'l. Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers	Sun Shipbuilding & Dry Dock Co.	Chester, Pa.	1/4/70	3,500	Up to $5,000 life insurance for retirees & company pays $1.50 a month toward retiree & wife's Medicare premium	No. 269 p. 13 May 1, 1970

UNION	COMPANY	LOCATION	DATE CONTRACT EFFECTIVE	NO. OF WORKERS	DESCRIPTION OF PROVISION	SOURCE, U.S. DEPT. LABOR CURRENT WAGE DEVELOPMENTS
United Stone & Allied Products Workers of America	Huron Cement Div., National Gypsum Co.	Alpena, Mich.	5/1/70	850	$3,500 life insurance for retiring employees effective 5/1/70 with company assuming full cost	No. 270 p. 11 June 1, 1970
United Textile Workers of America	Beaunit Corp., Fibers Division	Childersburg, Alabama	7/70	800	$2,000 life insurance for retirees	No. 272 p. 12 Aug. 1, 1970
UAW	ESB, Inc.	Various	4/1/70	1,800	Company assumes full cost of retired employees' Blue Cross-Blue Shield premium	No. 271 p. 11 & 12 July 1, 1970
UAW	The Torrington Co., a subsidiary of Ingersall-Rand Company	Torrington, Conn.	5/70	2,500	Present retirees pension rate increased to $3.50 a month	No. 271 p. 14 July 1, 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~010~~ 70-32

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1, *Petitioner,*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, and NATIONAL LABOR RELATIONS BOARD, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT PITTSBURGH PLATE GLASS COMPANY IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 910

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1, *Petitioner,*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, and NATIONAL LABOR RELATIONS BOARD, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENT PITTSBURGH PLATE GLASS COMPANY IN OPPOSITION

QUESTION PRESENTED

Whether under the circumstances the employer was required by Section 8(a)(5) of the Act to renegotiate with the union representing active employees the retirement benefits of persons already on retirement, or whether the employer could lawfully offer retirees an

individual option of continuing their established retirement benefits or electing, instead, to receive a cash contribution to Medicare.

STATEMENT OF THE CASE

A. The Facts

This case arose as a result of events occurring at the Barberton, Ohio, plant of respondent in March 1966. Previously, in 1964, respondent had increased its contribution to medical insurance for persons already on retirement from $2.00 to $4.00 per month, with the understanding that this extra $2.00 would be withdrawn if Medicare was enacted.

Medicare was enacted in 1965, and became effective July 1, 1966. Consequently, in March 1966, the company reduced its contribution to the medical insurance from $4.00 to $2.00 per month as had been stipulated. The company first proposed to cancel the insurance plan because it contained non-duplicating clauses which nullified its value for those retirees who enrolled in Medicare. But, when the union objected and sought to reopen the retirement benefits generally, the company decided to continue the insurance plan for those who wanted it. However, the company wrote to the retirees affected and offered them the individual option of continuing the medical insurance or withdrawing from the insurance plan and receiving, instead, a $3.00 per month contribution to cover the full cost of Medicare (App. A, pp. 2-5).[1]

The charges of unfair labor practice giving rise to this case were then filed with the NLRB.

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[1] All references in this brief in opposition are to the Appendix to the Petition for Certiorari.

B. The Trial Examiner's Decision

The Trial Examiner dismissed the charges. He found that in offering the option to the employees the company violated no provision of the Act. (App. E, pp. 56-73.)

C. The Board Decision

The NLRB reversed the Examiner. The Board majority held that the company had unilaterally changed the medical benefits of retired persons in violation of the Act when the company offered the option to the retirees (App. D, pp. 23-49).

One member of the Board dissented. He held that persons on permanent retirement are not "employees" and not a part of the "bargaining unit" which the union represents. He called on a long line of Board precedent excluding retirees from bargaining units and denying them a vote in the election of a bargaining agent. He found that, while some employers and unions had voluntarily negotiated increases in retiree benefits after their retirement, such voluntary practices did not create a *mandatory* obligation under the Act to renegotiate the benefits with which employees retire (App. D, pp. 49-54).

D. Decision of the Court Below

The court below set aside the Board's order.

The court held that the issue in the case was not whether benefits for active employees to take effect upon retirement are mandatory issues for bargaining. This issue is settled and is not before the court (App. A, pp. 8-9).

The court also pointed out that this is not a case of an employer abrogating retirement benefits, in which event the retiree would have an appropriate remedy for breach of contract under Section 301 of the Labor-Management Relations Act.

The court stated the issue:

> "The issue is, once retirement benefits have been negotiated for active employees [to take effect upon retirement] whether an employer may propose improvements in benefits to the retirees individually, or whether retirees are 'employees' under Section 8(a)(5), changes in whose benefits must be collectively bargained with the Union." (App. A, pp. 9-10).

On this issue, the court held that, while for some purposes, the Act extends protection to persons not currently serving employers, "by plain meaning an employer has no statutory duty to bargain collectively with persons who are not 'his employees'." (App. A, pp. 10-11).

The court derived this holding directly from the Statute. Section 8(a)(5), the court stated, plainly provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representative of *his employees,* subject to the provisions of Section 9(a)." (App. F, p. 74).

The court then examined the evidence and found that, on the facts of this case, retirement with this company is a complete and final severance of employment. Therefore, the court held, retirees are not "employees" of the "employer" for purposes of Section 8(a)(5).

The court further held that retirees were not included in the bargaining unit certified by the Board as appropriate under Section 9(a), a prerequisite to mandatory bargaining under Section 8(a)(5).

Section 9(a) states:

> "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for purposes of collective bargaining . . ." (App. F, p. 77).

The court noted that it has uniformly been held by the Board and the courts that the scope of the bargaining unit controls the extent of the bargaining obligation, and that a union cannot demand, over the employer's objection, a change in the unit as determined by the Board. In this case, the Board had certified a unit for bargaining which included only active employees working on hourly rates, and retirees were accordingly excluded from voting. This was done, as the court pointed out, in harmony with consistent Board rulings excluding retirees from bargaining units and from voting in representation elections. The court found, therefore, that the retirees of this company were not within the bargaining unit; and, therefore, under the plain meaning of the Act, the employer was under no mandatory duty to renegotiate the benefits with which they had retired (App. A, pp. 15-18).

Enforcement of the Board's decision was, therefore, denied. A motion for reconsideration, *en banc,* was also denied (App. C, p. 22).

ARGUMENT

A clear focus on what is and what is not involved in this case is essential.

There is no issue whether pension and insurance benefits are mandatory subjects of bargaining under the Act. *This issue* was settled long ago in *Inland Steel Company*, 170 F.2d 247 (C.A. 7, 1948), cert. den. 336 U.S. 960, and, as petitioner acknowledges, the court below accepted this principle without question. There is no issue as to the legal enforcement of retiree benefits. Nor is there an issue whether unions and employers may voluntarily negotiate benefits for persons already retired.

The sole issue is whether, once retirement benefits have been established and an employee retires and begins collecting his benefits, the union representing active bargaining unit employees can demand that the employer renegotiate these benefits, up or down, without limitation. The answer to this question turns on the Statute, and the court below correctly held that mandatory bargaining does not extend to renegotiating retirement benefits for persons already retired.

On the facts, the decision of the courts was manifestly correct. There is no conflict of decision, and, in the light of the language and purpose of the Act, no other result could have been reached. There is no important question of Federal law requiring decision by this Court.

Moreover, on the facts presented, the issue is a narrow one, not presenting an appropriate case for review or justifying the Board majority's far-ranging pronouncements. As cogently stated by the dissenting Board member:

> "Stripped to its essentials, this is a case where a union charges an employer unilaterally offered

an additional option on its health plan for past pensioners. The Company said it did so because the Federal Medicare program made its own program obsolete, but, after union protests, assured the pensioners they could choose to retain the original program without change. On this narrow base, the Board majority has erected a decision of far-reaching implications in the area of mandatory duty to bargain." (App. D, pp. 49-50).

The dissenting member held the view that the majority, in unnecessarily extrapolating the issue in this fashion, exceeded the Board's authority under the Act (App. D, p. 54).

The Board majority's broad dictum was grossly in error and had great potential for mischief in its impact on developing labor-management relationships along voluntary lines. But this manifest error has now been corrected by the decision of the court below. The issue, as presented, is not a close one. It has been correctly decided by the court below, and is simply not worthy of consideration by this Court on review.

A. The Decision Below Is Clearly Correct

The decision of the court below turned on the court's finding, after a careful review of the facts and governing law, that persons on retirement are not "employees" and not a part of the bargaining unit as provided in Section 8(a)(5) of the Act. The decision was clearly correct.

Section 8(a)(5) specifically provides that mandatory bargaining is limited to "employees" of the particular employer, and, by reference to Section 9(a), further restricts bargaining to the "unit" established as appropriate for such purposes.

The court's finding that the retirees are not employees of this employer is based on the record evidence. This evidence showed that with this company, retirement is a complete and final severance of employment. Upon retirement, employees are removed from payroll and seniority lists, and thereafter they perform no services for the employer, receive no wages, are under no restriction as to other employment, and have no expectation of reemployment. They lose their active status as union members, forfeit their voting rights in the union, and are relegated by the union's constitution to the status of non-voting "honorary" members. Based on these facts, the court held that retirees are not "employees" of the employer nor members of the bargaining unit. (App. A, pp. 14-18).

This finding is not seriously contested by petitioner. The main thrust of petitioner's argument is that, whether employees or not, or in the bargaining unit or not, renegotiation of retiree benefits is mandated by the Act because "active employees are vitally concerned with the level of benefits established for the retirees and that these benefits will be received."

As the court below rightly concluded, the acceptance of this argument would literally amount to an amendment to the Act. It would substitute for the statutory standard of unit bargaining a concept of "interest" bargaining with no recognizable metes or bounds. Under this concept, a union, once established as representative of any employee unit, could then unilaterally enlarge the unit to encompass bargaining for other classes of employees or persons clearly excluded from the unit it represents, as long as it might appear that the wages and benefits of the excluded groups could obliquely "affect" unit employees.

Petitioner's theory that bargaining for retirees is necessary to protect the bargaining interests of "active" employees in their own retirement benefits is conceptually false. The right of the representative of "active employees" to bargain for the benefits they are to receive on retirement is fully protected by the Act and is fully capable of exercise without involving retirees. There is nothing to suggest that active employees are handicapped or hampered in any degree *in negotiating their own retirement benefits by their inability to demand renegotiation of the benefits of those who have already retired.*

The second part of petitioner's argument is that mandatory renegotiation of retiree benefits is necessary to provide assurance that established retiree benefits will be paid. This argument is obviously without force. There is no correlation between protection of benefits already established and renegotiation of benefits. As the court below held, a complete answer to this argument is that the Federal law provides an effective means by which retirement benefits can be legally enforced (App. A, p. 17).

The conclusive answer to all of petitioner's arguments is found in the fact that Section 8(a)(5) defines and restricts the bargaining obligation: (1) to employees of the particular employer and (2) to members of the bargaining unit as defined in Section 9(a). The retirees here do not meet either test. But, if more were needed, it is revealing to contemplate the conflict with democratic principles involved in vesting exclusive bargaining authority over retiree benefits in a union designated by active employees to represent the interests of active employees. In this case, retirees have no vote or voice in the union, and no control over

union policies or negotiating positions; and, under unbroken Board precedent, they have no voice in selecting or changing or unseating the union which claims the exclusive right to negotiate changes in the benefits with which they have retired (App. D, p. 50). Petitioner's claim of mandatory bargaining authority cannot be squared with democratic precepts in general any more than it can be accommodated to the specific provision of the Act.

The decision of the court below finds solid support in the following:

1. The language of Section 8(a)(5) which restricts the employer's bargaining obligation to "his employees" and further makes the obligation subject to Section 9(a).

2. (a) the decision of this Court in *Phelps Dodge Corp.*, 313 U.S. 177 (1941):

> "In determining whether an employer has refused to bargain collectively with representatives of 'his employees' in violation of Section 8(5) and Section 9(a) it is of course essential to determine who are 'his employees'." 313 U.S. at 192.

(b) The decision of the NLRB in *Page Aircraft,* 123 NLRB 159, 43 LRRM 1383 (1959):

> "The antidiscrimination provision refers to employees *generally,* whereas, unlike these provisions, Section 8(a)(5) contains specific language requiring an employer to bargain for '*his employees*'." (Emphasis in original.)

(c) The decision of the Board and Third Circuit in *Piasecki Aircraft,* 123 NLRB 348, 43 LRRM 1443 (1959), enf'd 280 F.2d 575 (C.A. 3, 1960); cert. den. 364 U.S. 933:

> "It [the Board] recognized the distinction in Section 8(a)(5) wherein an employer is required

> to bargain in good faith with the representative of 'his employees' and held the Bellanca workers were not 'his' [Piasecki's] employees within the meaning of that Section. 280 F.2d at 589.

(d) The decision of the NLRB in *Briggs Manufacturing,* 75 NLRB 569, 21 LRRM 1056 (1959):

> "The Act thus provides for the use of the term 'employee' in the broad generic sense as defined in Section 2(3) of the Act, and also in a more limited sense whenever the Act explicitly so provides. In its generic sense the term is broad enough to include members of the working class generally (See *Phelps Dodge Corp* v. *NLRB,* 313 U.S. 177). In its limited sense, the term may include only the employees of a particular employer, as for example in Section 8(5), which requires the employer to bargain collectively with representatives of *'his employees,'* subject to the provisions of Section 9(a)." (Emphasis in original.)

3. The language of Section 9(a) which restricts bargaining to the "unit appropriate for such purposes."

4. The uniform precedents of the NLRB excluding retired persons from bargaining units and from voting in representative elections.

> "We have considerable doubt as to whether or not pensioners are employees within the meaning of Section 2(3) of the Act, since they no longer perform any work for the Employers and have little expectancy of resuming their former employment. In any event, even if pensioners were to be considered employees, we believe they lack a substantial community of interest with the employees who are presently in the active service of the Employers." *Public Service Corp.,* 72 NLRB at 229-30; see also, *W. D. Byron & Sons,* 55 NLRB 172, 14 LRRM 25 (1944); *J. S. Young Company,* 55 NLRB 1174 (1944).

5. The decision of this Court in *U.M.W.* v. *Pennington,* 381 U.S. 657, at 666 (1965), where the Court cautioned that bargaining must be conducted on a "unit by unit" basis, and, in an antitrust context, condemned "interest" bargaining.

Explicit to the point are those Board and court decisions which hold that the scope of the bargaining unit limits and controls the bargaining process. *I.L.A.* v. *NLRB,* 277 F.2d 681 (D.C. Cir. 1960); *Douds* v. *I.L.A.,* 241 F.2d 278 (C.A. 2, 1957).

The Board majority turned its back on and ignored its own and court precedents which have shaped the development of the law of mandatory bargaining since the inception of the Act. The court below has clearly perceived and corrected this error. The decision of the court below is plainly correct.

B. There Is No Conflict of Decision

Petitioner argues that the decision of the Court below conflicts with the opinion of the Court in *Teamsters Union* v. *Oliver,* 358 U.S. 283 (1958), and *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964), and with decisions of the Eighth and Ninth Circuits in *Blassie* v. *Kroger Co.,* 345 F.2d 58 (C.A. 8, 1965), *Local No. 688, International Bro. of Teamsters* v. *Townsend,* 345 F.2d 77 (C.A. 8, 1965); and *Garvison* v. *Jensen,* 355 F.2d 487 (C.A. 9, 1966).

There is no conflict with these decisions. The issue in *Oliver* and *Fibreboard* related to the contracting out of unit work. In *Oliver,* an antitrust case, the employer was contracting out unit work of the drivers to owner-operators who were in direct competition for the work of the unit drivers. In *Fibreboard,* the employer con-

tracted out to an independent contractor all of the jobs in the bargaining unit. The decisions hold that the union representing unit employees can require bargaining for reasonable restrictions to protect their unit work from erosion through subcontracting. There is no holding that the union's bargaining rights extend to actual and exclusive representation of persons outside the bargaining unit.

The important distinction is that, unlike the subcontractor employees in *Fibreboard* and the owner-operators in *Oliver,* persons on retirement do not compete in any way for unit work and in no way threaten the job security of the active unit employees or hamper their ability to negotiate their own wages, conditions, or retirement benefits. As the Court below said:

> "Leaving aside their altruistic sentiments, what active employees are interested in are *their own* retirement benefits. It is not necessary to extend the bargaining obligation to persons already retired in order to insure current employees the right to negotiate through their bargaining representative their own retirement benefits to take effect after their retirement." (App. A, pp. 17-18).

Petitioner's argument amounts to an attempted projection of mandatory bargaining authority beyond the bargaining unit to encompass classes of persons who are not employees and not a part of the unit for bargaining as defined pursuant to Section 9(a). The consequences of such a significant departure from the statutory concept of "unit bargaining" are vast and unplumbed and potentially disturbing to labor-management relations. The argument ignores the language and intent of the Act. As the Court below held:

> "Congress decreed that the bargaining agent's authority extend only to bargaining for 'all the em-

> ployees in a unit appropriate for such purposes'. The appropriate bargaining unit has economic incidents which the Board simply cannot modify by fiat or enlarge by sympathy." (App. A, p. 18).

The claimed conflict with *Blassie, Townsend* and *Garvison* does not exist.

These Circuit Court decisions involve an interpretation of Section 302, a criminal provision pointed narrowly at making it unlawful for an employer to make payoffs to unions and their representatives. Section 302(c) exempts from this criminal prohibition employer contributions to trust funds to pay pension and retirement benefits. These decisions hold only that the exemption allows payments to a trust fund for the benefit of retirees. They do not touch on mandatory bargaining or its proper scope.

The Court below considered *Blassie* and *Townsend* and correctly held that they were not apposite to the issue at hand.

C. There Is No Important Issue of Federal Law

Petitioner overstates the importance of the issue.

The issue is in a narrow sense one of first impression, but the principles which control its resolution have long been a part of the fabric of the law of collective bargaining.

Moreover, the very fact that this is the first case in the 35-year history of the Board in which the Board has felt impelled to consider this precise issue strongly suggests that the issue does not loom large in the spectrum of issues arising under the Act. When one takes into account the volume and intensity of litigation before the Board and in the courts over other issues

arising under the Act, the conviction emerges that the importance of this issue is more imagined than real.

There is nothing to suggest that the issue of mandatory renegotiation of retiree benefits has been a source of labor-management friction or labor unrest. Indeed, all signs point to the contrary.

Petitioner's expressed concern about the effect of the decision below on voluntary bargaining practices of management and labor is groundless.

The Court below did not declare renegotiation of benefits illegal or out of bounds. The court held only that such renegotiation was not mandated by the Act. The court noted with approval the development of voluntary practices between employers and unions reflecting their mutual concern with improving retiree benefits. The court below said:

> "This voluntary practice demonstrates the increasingly humanitarian quality of the labor-management relationship and is to be encouraged." (App. A, p. 20).

The court, in obedience to the Statute, wisely refused to channel these voluntary efforts into a mandatory mold.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

[redacted]

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 961

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the employer was required by Section 8 (a)(5) of the Act to renegotiate with the union representing active employees the medical benefits of persons already on retirement, or whether the employer could lawfully offer past retirees an individual option of continuing their established medical benefits or electing, instead, to receive a cash contribution to cover the cost of Medicare.

STATEMENT OF CASE

The facts are simple.

The union was certified in 1948 as the exclusive representative of the company's employees at its Barberton, Ohio, plant. The unit was restricted to all employees "working on hourly rates," and only those appearing on the active payroll were allowed to vote. Retirees were not included in the unit and did not vote in the election (App. A, pp. 15-16).[1]

From time to time since 1950, the company and union have negotiated retirement benefits for the active employees to take effect upon their retirement. The company maintained throughout, however, that it was not required to renegotiate changes in retiree benefits after retirement.

The company was willing to consider voluntary improvements in retiree benefits after retirement and, in fact, did so on several occasions.

In 1950, the company voluntarily agreed to allow persons on retirement to participate in the medical program. In 1954, the company again voluntarily improved the medical benefits for retired employees. Then, in 1962, the company voluntarily agreed to contribute $2.00 per month toward the cost of medical insurance, but only for employees who retired after June, 1962.

Later, in 1964, the company again voluntarily agreed to increase the $2.00 per month contribution to $4.00 per month, with the express understanding

[1] Record references are to Petitioner's Appendix to the Petition in Case No. 910.

that if Medicare were adopted, the contribution would revert to $2.00 per month.

That set the stage for the 1966 events at issue in this case.

Medicare was enacted in 1965 to take effect July 1, 1966. In March 1966, the company informed the union that, after extensive study of its medical plan for retirees, it had decided to discontinue the medical insurance plan for retirees because the plan contained non-duplicating features which rendered it valueless in view of Medicare. To assure the continuance of medical benefits, the company proposed to contribute $3.00 per month for each eligible retiree to cover the cost of Medicare. When the union objected to cancellation of the medical insurance, the company reconsidered, and decided to leave the medical insurance plan intact. In addition, the company offered each retiree the option of continuing under the medical plan or withdrawing and receiving a $3.00 per month contribution to Medicare (App. A, pp. 2-5).

The union filed charges with the NLRB.

The Trial Examiner's Decision

The gravamen of the charge was that the company had unilaterally modified its collective bargaining agreement by allegedly changing its medical plan for retirees.

The Trial Examiner found that, since the medical plan was kept intact, the company had merely afforded the retirees an additional option to exercise as they saw fit. This, he found, did not amount to a change or modification of the terms of the labor agreement. The Examiner further found that, for purposes

of Sections 8(a)(5) and 9(a), retirees are not "employees" of the company and not a part of the bargaining unit. Thus, he concluded that, while bargaining on their behalf was permissive, it was not mandatory under the Act. (App. E, pp. 56-73).

The Board Decision

The Board majority reversed the Examiner. The Board did not restrict itself to the narrow issue presented—whether the company had unilaterally modified an agreement—but chose to use the case as a vehicle for considering the broader issue of the status of retirees in relation to mandatory bargaining under the Act.

The Board majority carefully skirted the question of whether retirees are "employees" of the employer within the explicit meaning of Section 8(a)(5) or members of the bargaining unit under Section 9(a). Indeed, the Board conceded that, upon retirement, "most of the threads which once bound him [the retiree] to the unit are severed . . ." (App. D, p. 33).

Nevertheless, placing primary emphasis on what it regarded as social need, the Board majority held that retirees are "employees" in the general sense and, therefore, encompassed by the mandatory bargaining obligation under Section 8(a)(5). In the alternative, the Board majority held that, even if not employees or in the bargaining unit, renegotiation of retiree benefits after retirement is mandatory because their benefits "vitally affect active bargaining unit employees." (App. D, pp. 21-49) Implicit in the Board's holding would be the right of the bargaining agent to renegotiate retiree benefits *up or down.*

One Board member dissented.[2] He found that retirees were not employees of the employer under Section 8(a)(5) or members of the bargaining unit under Section 9(a). He pointed to a long line of Board decisions excluding retirees from bargaining units and from voting in employee representation elections. He found that, while some employers had voluntarily renegotiated changes in benefits for retirees after retirement, such voluntary practices did not create a mandatory obligation under the Act (App. D, pp. 49-54).

The dissenting member questioned the Board majority's broad policy pronouncements. He stated:

> "Stripped to its essentials, this is a case where a union charged an employer unilaterally offered an additional option on its health plan for pensioners. The company said it did so because the Federal Medicare program made its own program obsolete, but, after union protests, assured the pensioners they could choose to retain the original program without change. On this narrow base, the Board majority has erected a decision of far-reaching implications in the mandatory duty to bargain." (App. D., pp. 49-50).

Decision of the Court Below

On a petition for review, the court below set aside the Board's order. A petition for rehearing before the court, *en banc,* was denied.

The court below held that there is no issue as to whether retirement benefits for active employees to vest upon retirement are mandatory bargaining subjects. This was settled long ago in *Inland Steel Com-*

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[2] The current NLRB Chairman has since noted his disagreement with the Board majority. See *Hooker Chemical Corporation,* 186 NLRB No. 49, Note 2 (1970).

pany v. *NLRB,* 170 F.2d 247, (C.A. 7, 1948), cert. den. 336 U.S. 960. The court also held there is no issue as to the legal enforcement of retirement benefits. These benefits are protected by Federal law (App. A, p. 17).

The court below found that the only issue presented was whether "an employer may propose improvements in benefits to the retirees individually" or whether the union representing current employees may force the employer to renegotiate retiree benefits after their retirement (App. A, pp. 7-8, 9-10).

On this issue, the court held that the mandatory bargaining obligation under Section 8(a)(5) applied only to "employees" of the employer and only those employees who are members of the unit established as appropriate for bargaining under Section 9(a). The court below found inapplicable those cases cited by the Board which hold that antidiscrimination provisions of the Act [Section 8(a)(1) and (3)] extend protection to applicants for employment and to laid-off and discharged employees. The court correctly noted that, while it is true that for many purposes the Act extends protection to employees not currently serving employers, "by plain meaning an employer has no statutory duty to bargain collectively with respect to persons who are not 'his employees'." The court noted that this distinction was recognized by this Court as long ago as 1941 in the landmark decision in *Phelps Dodge Corporation* v. *NLRB,* 313 U.S. 177 (1941).[3] The distinction also has been uni-

[3] In *Phelps Dodge,* the Court stated:

"In determining whether an employer refused to bargain collectively with representatives of 'his employees' in violation of § 8(5) and § 9(a), it is of course essential to determine who constitutes 'his employees'. One aspect of this is covered by § 9(b) which provides for the determination of the appropriate bargaining unit. 313 U.S., at 192."

formly recognized by the Board prior to this case. See, for example, *Page Aircraft Maintenance, Inc.*, 123 NLRB 159, 163, 43 LRRM 1383 (1959).[4]

In addition, the court held, the mandatory bargaining obligation is further limited to the unit appropriate for bargaining as defined under Section 9(a). Section 8 (a)(5) expressly so provides. The court noted that it is well-settled law that the scope of the bargaining unit controls the extent of the mandatory bargaining obligation. See for example, *Douds* v. *I.L.A.*, 241 F.2d 278 (C.A. 2, 1957).

Examining the facts in the light of these recognized principles, the court below found that persons on retirement are not employees of the employer and not in the bargaining unit.

The court found that retirement with this employer is a permanent severance of employment. Retirees have no expectancy of reemployment, perform no services for the employer, receive no wages, and are under no restrictions as to other employment or activities. By the same token, this record shows that retirees have no active, voting status in the union and are thus unable to exert a voice in determining the union's policies. In short, retirees meet none of the normal indicia of employment. The fact that retirees receive

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[4] In *Page Aircraft*, the Board said:

> "We do not regard as controlling for the purpose of determining for whom an employer must bargain those cases cited . . . which hold that the antidiscrimination provisions of Section 8(a)(3), (4) and (b)(2) of the Act forbid discrimination against applicants for employment. The antidiscrimination provisions refer to 'employee' *generally*, whereas, unlike these provisions, Section 8(a)(5) contains specific language requiring an employer to bargain for '*his* employees'." [Emphasis in original], 123 NLRB at 163.

retirement benefits and are given the status of "honorary" members of the union merely serves to emphasize the finality of their employment severance.

Turning to the bargaining unit, the court held that the unit for bargaining certified by the Board included active employees only and clearly excluded retirees.

The exclusion of retirees from the bargaining unit and from voting on the election of the unit representative was in line with unbroken Board precedent. As the court pointed out, in no prior case where the issue was raised has the Board held that a permanent retiree is a part of the unit or entitled to vote in an election. See *Taunton Supply Corporation,* 137 NLRB 221, 223 (1962); *Public Service Corporation of New Jersey,* 72 NLRB 224, 229-230 (1947);[5] *J. S. Young Company,* 55 NLRB 1174 (1944); *W. D. Byron & Sons,* 55 NLRB 172, 174-175, 14 LRRM 25 (1944).

The court concluded that, since retirees are not employees of the employer and not in the bargaining unit, the employer had no mandatory duty to renegotiate their retirement benefits with the unit representative.

The court then considered the Board's alternative holding, which was that even if not employees of the employer or in the bargaining unit, mandatory re-

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[5] In *Public Service Corporation,* the Board said:

> "We have considerable doubt as to whether or not pensioners are employees within the meaning of Section 2(3) of the Act, since they no longer perform any work for the Employers and have little expectancy of resuming their former employment. In any event, even if pensioners were to be considered as employees, we believe that they lack a substantial community of interest with the employees who are presently in the active service of the Employers."

negotiation of retiree benefits after their retirement is required because the subject "vitally affects" unit employees.

To support this contention, the Board argued (1) that the union and the current employees have a legitimate interest in assuring that retirement benefits are in fact paid; (2) that active employees have a "selfish interest" in bargaining about retirement benefits; and (3) that employer funds spent to pay benefits to retirees "affect the availability of funds" to pay benefits to active employees.

The court below found none of these arguments persuasive on the issue of mandatory bargaining for retirees.

First, the court pointed out that, once retirement benefits have been established, earned and become payable, the employer may not recant the obligation and, if he attempts to do so, the law provides a remedy. Section 301, Labor-Management Relations Act, 1947, 29 U.S.C. § 185(a).

Second, the court held that it is not necessary to extend the bargaining obligation to persons already retired in order to insure current employees the right to negotiate their own retirement benefits to take effect after retirement. Their superior bargaining power and ability to strike insures them the effective exercise of this right without involving retiree benefits in the bargaining. The appropriate time for an employee to negotiate his retirement benefits is when he is still employed.

Third, the court found no substance in the Board's argument that the union must control the benefits of retirees because retiree benefits siphon off employer

funds which would otherwise be available for increased wages and benefits for active unit employees.

The court found a conclusive answer to this argument in the Act's requirement that "the bargaining agent's authority extends only to bargaining for 'all of the employees in a unit appropriate for such purposes'." See Section 9(a). Since retirees are not employees of the employer and not in the bargaining unit, the union is not their exclusive representative and there is no obligation to bargain their benefits with the union. Moreover, the court correctly perceived that the Board's argument proves too much. As the court pointed out, all employer expenditures, from dividends to capital expenditures, salaries, and wages of supervisors and employees outside the bargaining unit, and a host of other expenditures necessarily affect the "availability" of employer funds for active employees. Surely, the court said, the Board would not contend that these expenditures are subject to mandatory bargaining.

The court concluded that the Board's alternative holding is not only without support in the language of the Act but is also in defiance of its purpose.

ARGUMENT

The case does not present an issue appropriate for review by the Court.

The decision below is well-reasoned and is clearly correct. There is no conflict of Circuits or with decisions of the Court. On the facts, the case presents a narrow issue not justifying the Board majority's far-ranging dictum.

The importance, and even the novelty, of the issue is overdrawn. While in a sense the issue is one of

first impression, the legal principles applied by the court below are well settled and have long been recognized as controlling the scope and extent of the bargaining process under the Act.

As the dissenting Board member and the court below noted, employers and unions have over the years developed a variety of voluntary practices and accommodations for treating with retiree benefits. The success of these voluntary endeavors is shown by the almost total lack of controversy over this issue. Out of the huge volume of cases arising before the Board on a multitude of contested issues, this is the first case in its 35-year history that the Board has felt called upon to address itself to this issue. This speaks well of the capacity of labor and management to deal realistically and practically with a problem on a purely voluntary basis. It also speaks well of the flexibility and adaptability of free collective bargaining and its ability to function in a difficult area without creating undue stress or strain. As the court below wisely said, these voluntary efforts should be encouraged, not strait-jacketed into a rigid mandatory requirement.

A. The Decision of the Court Below Is Clearly Correct

The carefully considered opinion of the court below contains in full measure its own rationale and support. The issue is not a close one, and the unanimous decision was clearly correct.

The court's reading of the Statute in terms of both language and purpose cannot be questioned. The entire statutory scheme is constructed on the basic principle that mandatory bargaining is confined to bargaining units composed of employees of the em-

ployer sharing a close community of interests in wages, hours, and working conditions.

To this end, Section 9 of the Act provides mechanisms and procedures for defining the unit for bargaining and for the selection of a unit representative by majority voice of the unit members. Once the representative is selected in the unit as defined, that representative is accorded the status of the sole and exclusive representative of *all* the members of the unit. This is a very special status, and one which carries with it great powers. But this power is confined to the employees in the unit which was found appropriate and whose members selected the unit representative.

This exclusive representation status is coextensive with the bargaining unit, but it extends to no other class of employee or persons who are excluded from the unit as defined.[6]

Section 8(a)(5) imposes on the employer the mandatory duty to recognize the unit representative and bargain on behalf of "his employees" in the bargaining unit. Section 8(b)(3) imposes the same obligation on the unit representative. The bargaining obligation encompasses all members of the unit but no one else. That is the statutory scheme, and, until this case, the Board and courts have honored and enforced this principle without exception. The principle is axiomatic by now. The scope of the bargaining unit controls the legality and scope of the bargaining obli-

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[6] The Board acknowledged this in its Brief in the court below:

> "We do not take issue with the proposition suggested by the various cases cited by the Company (Br. 26) that an employer is under no duty to bargain for employees not within the bargaining unit." (Bd. Br. 30)

gation. *Douds* v. *I.L.A.*, 241 F.2d 278 (C.A. 2, 1957); *I.L.A.* v. *NLRB*, 277 F.2d 681 (D.C. Cir. 1960); *AFL-CIO Joint Negotiating Committee*, 184 NLRB No. 106, 74 LLRM 1705 (1970).

If this unit bargaining principle were abandoned, chaos would be injected in bargaining relationships. A bargaining representative, once certified for a particular unit, could then demand bargaining for excluded classes of employees in the same plant or even other plants or establishments operated by the same or even another employer. A certification would then lose its dignity as defining the allowable scope of mandatory bargaining and become a mere launching pad for demanding bargaining of wages and benefits for persons far removed from the unit which the union was certified to represent.

Such a radical departure from well-settled principles could only serve to proliferate and exacerbate labor-management conflict and encourage jurisdictional disputes.

The Board's projected departure from the statutory principle of unit bargaining would also make serious inroads in the principle of majority rule embodied in Section 9. Under Section 9, the members of the bargaining unit have the right to select, reject, change, or decertify their bargaining representative. They also generally have the right through election of officers and bargaining committee and ratification of agreements to control the policies of their selected bargaining agent.

The Board's new theory of "interest" bargaining, as opposed to "unit" bargaining, necessarily contemplates exclusive representation of categories of employees or persons, such as retirees, who are not in

the unit and have no voice in the selection or rejection of the unit representative or in its bargaining policies. In this very case, in accord with uniform Board policy, retirees were not included in the bargaining unit and did not vote in the NLRB election of the unit representative.[7] Moreover, retirees hold "honorary" membership only in the union and have no vote or voice in union affairs. As recent as November 11, 1970, the Board has conducted another representation election in the same unit at the Barberton plant, and has again excluded retirees. Case No. 8-RC-7934.

This conflict with basic principles of industrial democracy further points up the incompatibility with statutory principle implicit in the Board's "interest" bargaining concept.

B. There Is No Conflict of Decision

Petitioner claims a conflict with decisions of this Court in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964), and *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283 (1959).[8]

There is no conflict with these decisions.

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[7] As the Board has long held in determining the appropriateness of bargaining units:

> "First and foremost is the principle that mutuality of interest in wages, hours, and working conditions is the prime determinant of whether a given group of employees constitutes an appropriate unit." *Continental Baking Co.*, 99 NLRB 777, 782 (1952).

[8] The Board petitioner has apparently abandoned the claim, elaborated by the Board in its decision (App. D, 36), that appellate court opinions construing Section 302(b) of the Act should govern the construction given to Section 8(a)(5) of the Act. *Blassie* v. *Kroger Co.*, 345 F.2d 58 (C.A. 8, 1965); *Teamsters Local No. 688* v. *Townsend*, 345 F.2d 77 (C.A. 8, 1965); *Garvison* v. *Jensen*, 355 F.2d 487 (C.A. 9, 1966).

The Board continues to confuse the subject matter for bargaining with the identity and composition of the unit for bargaining.

In *Fibreboard,* the Court was careful to confine its holding within narrow limits. The decision holds that an employer violates his bargaining obligation when he contracts out all of the work in the bargaining unit without prior notice and bargaining with the unit representative. Enforcement of the bargaining obligation was necessary in *Fibreboard* to protect unit work from total obliteration by contracting out.

In *Oliver,* involving application of a state antitrust law, the employer was contracting out unit work to owner-drivers performing the same work as employee drivers. The Court upheld a contract provision regulating the minimum equipment rental to be paid the owner-driver as a reasonable restriction to protect the jobs and rate structure of the regular employees.

In both *Fibreboard* and *Oliver,* the bargaining sanctioned by the Court was considered necessary to protect unit work from erosion by contracting out. In *Fibreboard* all of the unit work was involved, and in *Oliver* part of it. The bargaining in each case was *on behalf of* the unit employees. There was no holding that the unit bargaining representative could exercise mandatory authority to represent and negotiate *on behalf of* persons outside the bargaining unit.

The touchstone of these decisions is the protection of unit work and work standards.

There is nothing in *Oliver* that bears on the issue here. The principle applied in *Oliver* is the same as that in cases arising under the secondary boycott provisions [Sections 8(b)(4) and 8(e)] involving re-

strictions on the contracting out of unit work. Where contract clauses merely seek to remove the economic incentive for contracting out or even prohibit contracting out, these provisions have been upheld as legitimate attempts by the union to protect and preserve the unit work and work standards of the bargaining unit.[9]

Retirees have permanently left the work force, and pose no threat to the jobs or standards of the active unit employees. There can be no doubt that, given their ability to shut down operations by a strike and their consequent superior bargaining strength, the active unit employees can protect and advance their own bargaining interests, rates, and benefits, without having control over the negotiation of benefits of retirees. As petitioner acknowledges (p. 9):

> "To be sure, the union can negotiate a retirement plan for active employees alone and protect itself against breaches of that plan . . ." (Board Pet., p. 9)

This concession discloses the fallacy not only of the "interest" bargaining argument but, also, the subsidiary argument that the rates and benefits of active employees and retirees are so interwoven that it is unrealistic to contemplate bargaining about one and not the other. This company, and this is typical practice, has established various levels of benefits for persons retiring at different times. The levels and types of benefits, including medical benefits, differ substantially as between active employees and retirees. These vari-

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[9] *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612 (1967); *Orange Belt District Council of Painters No. 48, AFL-CIO* v. *NLRB*, 328 F.2d 534 (D.C.C.A., 1964).

ous benefit plans are clearly separate and distinguishable. There is no practical impediment to negotiating rates and retirement benefits for active employees without renegotiating the benefits of persons already retired. This is done in countless situations.

The basic infirmity of the "interest" bargaining theory is that it conflicts squarely with the language and purpose of the Act. As the court below held:

> "Congress decreed that the bargaining agent's authority extends only to bargaining for 'all the employees in a unit appropriate for such purposes'." (App. A, p. 18)

The concept of "interest" bargaining would substantially reshape the bargaining process as envisaged by the Act and as practiced over the years, and would create new areas of controversy and conflict, all the dimensions of which cannot be foreseen. There is no support in the Act for so radical a departure from the established rules.

C. There Is No Important Issue of Federal Law

The decision of the court below was made in harmony with well-established and well-understood principles that govern the bargaining process. The fact that this is the first case where the Board has attempted to extend mandatory bargaining to persons who are not employees and not in the bargaining unit underscores the degree of the Board's departure from these principles.

There is nothing that indicates that this issue has led to any significant labor-management conflict.

Assertions made that some employers voluntarily discuss or renegotiate retiree benefits may be assumed

to be true, although there is no evidence of this in the record of the case. It is equally true that many others do not. Briefs filed by *Amici* in the court below show that a wide variety of practices exist, ranging from unilateral improvements in retiree benefits by employers to negotiating improvements with the union, with a range of practices in between. What this practice shows most of all is that in an atmosphere of free collective bargaining, wholly free of restraint, labor and management have been able to find harmonious and satisfactory solutions to the problem on a voluntary basis.

The court below has done nothing to impinge on or hamper the development of these mutual arrangements. Rather, the court below has said that they are to be encouraged.

The court below has not, as petitioner implies, denied the protection of the Act to these voluntary arrangements. The court has held only that renegotiation of retiree benefits is not mandatory. These voluntary arrangements are still permissive and have not been in any degree inhibited by the decision.

There is perhaps no better way to inhibit management and labor from this type of experimentation and from further development of cooperative undertakings in new areas along voluntary lines than to hold that such voluntary efforts, *ipso facto,* create a mandatory obligation.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 910.

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1,

Petitioner,

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF PETITIONER.

OPINIONS BELOW.

The opinion of the court of appeals (A. 183-200), is reported at 427 F.2d 936. The order denying the petition of the National Labor Relations Board for rehearing is printed in the Appendix at page 202. The findings of fact, conclusions of law, and order of the National Labor Relations Board (A. 25-48) are reported at 177 NLRB No. 114.

JURISDICTION.

The judgment of the court of appeals (A. 201) was entered on June 10, 1970. The Board's timely petition for rehearing *en banc* was denied (Judges Edwards and McCree dissenting) on July 31, 1970 (A. 202). The petition for a writ of certiorari was filed on October 27, 1970 and granted on February 22, 1971, simultaneously with the grant in *National Labor Relations Board v. Pittsburgh Plate Glass Co.*, No. 961, this Term, and both cases are consolidated, 91 S. Ct. 867 (A. 203). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.) are printed in the Appendix to this brief, *infra*, pp. 33-38.

QUESTIONS PRESENTED.

(1) Whether an employer violates Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to bargain with the statutory bargaining representative of his employees about changing health insurance benefits previously negotiated for retired employees; and (2) Did the Board properly find that the Company unilaterally changed its negotiated health insurance plan for retired employees, in violation of Section 8(a)(5) and (1) of the Act.

STATEMENT.

A. THE BOARD'S FINDINGS OF FACT.

The Union Petitioner, Allied Chemical & Alkali Workers of America, Local No. 1, has been the exclusive bargaining representative of hourly-rated employees at the Company's Barberton, Ohio plant since 1949 (A. 26; 116). The Union negotiated its first pension agreement with the Company in 1950. At the same time it reached a verbal understanding on a medical insurance and hospitalization program for retired employees (A. 26; 116, 150, 151). Retired employees paid for this insurance through deductions from their monthly pension checks (A. 26, 117). In 1954 the hospitalization coverage for retirees was increased to $10.00 a day (A. 26; 151). In 1959 the Union and Company negotiated an increase in the daily hospitalization benefits and this understanding was embodied in a written agreement (A. 26; Co. Exh. 1; 108, 109, 117, 151, 152).

In 1962 the Company and Union agreed upon a reduced hospitalization and surgical plan for employees retiring after June 27, 1962. This cost $11.41 per month for the retiree and his spouse. The Company agreed to contribute $2.00 per month per employee toward the cost of this plan and to provide a $2,000 life insurance policy at no cost to the employee (A. Gen. Co. Exh. 2; 56, 118). An amended pension agreement was negotiated also which increased benefits and made retirement mandatory at age 65 for those retiring after June 28, 1964 (A. Gen. Co. Exh. 4; 61-64, 120).

In the 1964 negotiations the Company increased its monthly contribution from $2.00 to $4.00 for those retirees who had subscribed to the 1962 reduced hospitalization and surgical plan. The parties agreed also that the

Company would reduce its contribution by the amount of the 1964 increase when Medicare became effective (A. 27).

Medicare was enacted on July 30, 1965 and became effective on July 1, 1966.[1] In November, 1965 the Union proposed that the Company engage in mid-term bargaining concerning supplemental insurance benefits which were not available to retired employees under the Medicare program.

On March 21, 1966 the Company advised the Union that because of the enactment of Medicare it would withdraw the $2.00 contribution which had been added by the 1964 labor agreement. The Union was also informed that the negotiated insurance program would be terminated because the Company's insurance carrier contended that the non-duplication of benefits provision in the Company's policy precluded payment of benefits provided by Medicare (A. 27, 28). Instead, the Company decided to contribute $3.00 a month for each retired employee to cover the cost of his supplemental Medicare coverage (A. 28). The Union's request to bargain about its proposal to "add-on" benefits not provided by Medicare was rejected and the Company challenged altogether the Union's right to bargain for retired employees (A. 28).

The Union conceded the Company's right to withdraw the $2.00 contribution added by the 1964 labor agreement, but protested the termination of the insurance program (A. 28). The Union stated that the cancellation of the insurance program would create other problems because retired employees and their wives under age 65, and not eligible for Medicare, would be without any protection (A. 126). The Company declared that it would prepare a plan to cover retirees and their wives not yet eligible for Medicare (A. 126).

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[1] Health Insurance for the Aged Act, Pub. L. 89-97, 79 Stat. 291, 42 U.S.C. 1395 (1965).

On March 23, 1966 the Company told the Union that it had reconsidered its earlier position and decided not to abrogate the negotiated health insurance plan for retirees. Instead, each retired employee would be required to elect between remaining in the existing insurance plan, or withdrawing from participation and accepting in lieu the Company's $3.00 per month contribution toward payment of supplemental Medicare benefits (A. 28). The Union objected but the Company refused to bargain about changes in the retirees' program to supplement Medicare.

On March 24, the Company advised all retirees by mail of its decision and that they had to complete their Medicare enrollment by March 31, 1966 if they withdrew from participation in the Company plan. Retirees were advised further that where the current monthly contribution was $4.00 for those remaining in the plan, it would be reduced to $2.00 when the Social Security benefits became available (A. Gen. Co. Ex. 7, 92-99, 129). Fifteen retired employees cancelled their participation in the health insurance plan (A. 28). On April 12, 1966 the Union filed charges with the Board alleging that the Company's conduct constituted a refusal to bargain (A. 3, 28).

B. THE BOARD'S DECISION AND ORDER.

On the basis of the foregoing facts which are not in dispute, the Board (Member Zagoria dissenting, A. 48-52), found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union about changes in benefits provided for employees who were retired from the bargaining unit, and by unilaterally changing their insurance benefits (A. 47). The Board concluded that retirees are "employees" within the meaning of the Act for the purpose of bargaining about changes in their

retirement benefits; that bargaining about such changes is within the contemplation of the statute because of the interest which active employees in the bargaining unit have in the subject; and, that bargaining about the subject of benefits for retirees is comprehended by the statutory requirement of bargaining about "wages, hours, and other terms and conditions of employment" (A. 30).

C. THE DECISION OF THE COURT OF APPEALS.

The court of appeals held that the Company was not required to bargain with the Union about changes in the hospitalization and medical insurance plan for retired employees because they were neither "employees" under Section 8(a) (5) of the Act (A. 191), nor members of the bargaining unit as defined in Section 9(a) of the Act (A. 199). The finding that the Company unilaterally changed the negotiated insurance benefits of its retired employees was rejected (A. 191) and the court denied enforcement of the Board's order (A. 200).[2]

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[2] The Board, with due deference to the lower court's decision, adheres to the ruling in the instant case in decisions subsequent thereto: *Westinghouse Electric Corporation*, 188 NLRB No. 126 (1971); *Union Carbide Corporation, Carbon Products Division*, 187 NLRB No. 10 (1970); *Hooker Chemical Corporation, etc.*, 186 NLRB No. 49 (1970).

SUMMARY OF ARGUMENT.

In the two decades following the decisions in *Inland Steel Co. v. NLRB*, 170 F.2d 247 (1948), and *W. W. Cross & Co. v. NLRB*, 174 F.2d 875 (1949), there has been a steady increase in the number of collectively bargained retirement plans providing pensions and insurance benefits for employees.[3] In 1950 the Company provided a hospitalization insurance plan for retired employees and by 1964 there was in effect a negotiated hospitalization and medical program tied into a retirement plan.

The enactment in July, 1965 of the "Health Insurance For the Aged Act," Publ. L. 89-97, 42 U.S.C. 1395, et seq., established a program of basic protection for the aged against the cost of hospital services, 42 U.S.C. 1395c, and a voluntary supplementary program to cover the costs of doctors' services and related items to be financed in part by premium payments by enrollees. 42 U.S.C. 1395j. The 1964 negotiations between the Company and the Union anticipated its enactment. The Board found a violation of Section 8(a)(5) and (1) of the Act when the Company refused the Union's request to bargain about changes in the insurance plan that would make it compatible with Medicare. The Board concluded that retirees were employees for the purpose of bargaining about changes in their retirement benefits and that bargaining about retirement benefits provided retirees was entirely consistent with the statutory requirement that "wages, hours, and other terms and conditions of employment" be a mandatory subject of collective bargaining.

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[3] Welfare and Pension Plans Disclosure Act, 1958, Section 2(a), 72 Stat. 997, 29 U.S.C. Section 301(a): "The Congress finds that the growth in size, scope, and number of employee welfare and pension benefit plans in recent years has been rapid and substantial; * * *"

The Board's interpretation of the statute that retired employees were "employees" for the purpose of bargaining about changes in their retirement benefits was fully justified and is entitled to "great deference," *Griggs v. Duke Power Co.*, ____ U.S. ____, 91 S. Ct. 849, 855 (1971); *United States v. City of Chicago*, 400 U.S. 8, 91 S. Ct. 18, 20.

The statutory obligation of bargaining is not diminished because it involves a matter affecting retired workers who are no longer on the active payroll. This Court in *Local 24, Teamsters v. Oliver*, 358 U.S. 283 (1959), held that the union was entitled to bargain about minimum rentals to be paid owner-drivers on trucks to be driven, not by employees, but by their owner-drivers and it was not necessary to determine whether these owner-drivers were employees. These minimum rentals affected the terms and conditions of employment of the employees. Here, as in *Oliver*, it is not necessary to determine whether retired workers are employees within the statutory definition as that term is set forth. It is sufficient, as the Board found, that the benefits for the retired workers "were integral" to the terms and conditions of employment of the active employees.

The retirement benefits involved here were part of a larger Company retirement plan negotiated with the Union covering active as well as retired workers. The enactment of Medicare in 1965 made changes in that plan of utmost importance to the retired workers. The Company's refusal to bargain with the Union and the unilateral changes which followed altered an existing plan and were in defiance of the Act and the statutory rights of the Union. It deprived the retired workers of the opportunity immediately available to understand what was to be done and to make an intelligent choice of alternate possibilities.

Sections 8(a)(5) and (1) of the Act were also violated when the Company required retirees to accept one or the other of two alternatives, thus changing and modifying an existing negotiated plan. This conduct ignored various other possibilities which might have been made available to retirees had the Company bargained with the Union. By its failure to do so it violated Section 8(a)(5) and (1) as well as Section 8(d) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. General Electric Co.*, 418 F.2d 736 (CA-2, 1969), cert. denied, 397 U.S. 965 (1970).

ARGUMENT.

A. INTRODUCTION.

This case consolidated with *National Labor Relations Board v. Pittsburgh Plate Glass Company, Chemical Division*, No. 961, this Term, raises for the first time in the administration of the Act, the question of whether the negotiation of changes in retirement benefits for retired employees is a mandatory subject of collective bargaining. The practice in industry has been to bargain about changes in benefits provided retirees. The comprehensive data in the Appendix of the brief *amicus curiae* for the American Federation of Labor-Congress of Industrial Organizations, and International Union, United Automobile Workers, on petition for a writ of certiorari in No. 961, this Term, demonstrates the extent of collective bargaining on this issue in American industrial life.

The lower court refusing to enforce the Board's order concluded that the Company was privileged to bargain individually with retired employees about changes in their hospitalization and medical insurance benefits, and was not mandated to bargain with the Union about these changes (A. 191). In its analysis of the issues the court

juxtaposed the definition of an employee found in Section 2(3) of the Act with Section 8(a)(5) which makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of "his employees." The lower court found that the language of Section 8(a)(5) limited the Union's right to bargain to employees actively employed in a unit appropriate for that purpose under Section 9(a) and that retirees were not employees (A. 195, 196). The Court rejected the Board's informed and considered judgment based upon extensive industrial acceptance and understanding of the practice of bargaining about the benefits of retired employees.

B. EXPANDING SCOPE OF THE DUTY TO BARGAIN.

Collective bargaining is defined by Section 8(d) of the Act, and, in pertinent part, provides that:

> "* * * to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times, and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *." (App., *infra*, p. 35).

The decisions in *Inland Steel Company*, 77 NLRB 1 (1948), enforced *Inland Steel Co. v. NLRB*, 170 F.2d 247 (CA-7, 1948), cert. denied 336 U.S. 960, and *W. W. Cross & Company*, 77 NLRB 1162 (1948) enf'd. *W. W. Cross & Co. v. NLRB*, 174 F.2d 875 (CA-1, 1949), determined that employee pension, group health and accident insurance programs were mandatory subjects of collective bar-

gaining. The principle of these decisions has become firmly fixed in the development of the collective bargaining process as practiced by labor and management.

The court's decision removes the subject of pension rights and improvement in health care for the retired employee from the bargaining table and makes it dependent, in the lower court's phrase, upon "the increasingly humanitarian quality of the labor-management relationship" (A. 200). The decision freezes the subject of changing health care patterns at a time of general inflationary pressures and increasing need for health protection.[4]

Collective bargaining is a constantly evolving process which reflects the mutual obligation of an employer and union to meet and confer about "wages, hours, and other terms and conditions of employment." *Telegraphers v. Railway Express Agency,* 321 U.S. 342, 346 (1944); *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 211 (1964); *Local 24, Teamsters v. Oliver,* 358 U.S. 283 (1959).[5] The Board observed in *Houston Chapter, Associated General Contractors,* 143 NLRB 409, 413 (1963):

> "* * * we note the language of the Supreme Court in [*Order of Railroad Telegraphers v. Chicago & N.W. R.R. Co.*, 362 U.S. 330, 338 (1964)] that '* * * the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow the scope of subjects about which workers and railroads may or must negotiate and bargain collectively.' This language takes on added significance from the fact that the courts have held that the bargaining obligation under the National Labor Relations Act is *broader* in scope than under the Railway Labor Act. Thus, the

[4] Ehrenreich, *Private Health Insurance and Medical Care,* U.S. Dept. of H.E.W. Social Security Administration, p. 1 (1968).

[5] We propose to show that the collective bargaining process was necessary to accommodate recently enacted federal law to the parties' collective bargaining agreement.

> range of mandatory subjects of bargaining under the National Labor Relations Act has been found to include Christmas bonuses; retirement and pension plans; vacations; an employees' stock purchase plan; union security, checkoff, seniority, and grievances; and more recently the elimination of jobs through subcontracting, or because of technological changes. As the relationship between employers and employees evolves, new areas may be found which affect 'wages, hours, and other terms and conditions of employment,' and thus the list of mandatory subjects of bargaining quite properly is enlarged." (Emphasis in original, footnotes omitted.)

The Company's obligation to bargain collectively with the Union does not cease because some beneficiaries of the Union's representation are persons who do not meet the criteria used by the Board in determining eligibility to vote in a Board conducted representation election. Section 2(3) of the Act (App., *infra*, p. 33) states in part that:

> "(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, * * *"

This Court said the term "employee" like other provisions, "must be understood with reference to the purpose of the Act and the facts involved in the economic relationship," *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 129 (1944); *NLRB v. E. C. Atkins & Son Co.*, 331 U.S. 398, 403 (1947). Thus the Board found specifically in the instant case that:

> "* * * From our study of the Labor Act, its policies, its legislative and decisional history, we conclude: First, that retired employees are 'employees' within the meaning of the statute for the purposes of bargaining about changes in their retirement benefits; second,

> that bargaining about changes in retirement benefits for retired employees is in any event within the contemplation of the statute because of the interest which active employees have in this subject; and, third, that bargaining about such benefits is fully consonant with the statutory requirement that 'wages, hours, and other terms and conditions of employment' be subject to the institution of collective bargaining envisioned by the Act." (A. 30) [6]

The conclusion that retired persons are "employees" within the meaning of the Act for the purposes of bargaining about change in their retirement benefits, is an interpretation which is wholly consonant with modern labor-management relations, giving added substance and meaning to the collective bargaining process.

This interpretation of the Act should be given great weight. On March 8, 1971, the Court said, "The administrative interpretation of the [Civil Rights Act of 1964] by the enforcing agency is entitled to great deference." *Griggs v. Duke Power Co.*, ____ U.S. ____, 91 S. Ct. 849, 855. This Court continues to emphasize the importance of deference to an administrative interpretation by the agency charged with the initial interpretation of a new law, *United States v. City of Chicago*, 400 U.S. 8, 91 S. Ct. 18, 20; *Udall v. Tallman*, 380 U.S. 1 (1965) and *Local No. 207, International Association of Bridge Workers, etc. v. Perko*, 373 U.S. 701, 706 (1963), where it was said that "* * * difficult problems of definition of status, * * *" are precisely " 'of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole'," quoting *Marine Engineers Beneficial Assn. v. Interlake Steamship Co.*, 370 U.S. 173, 180 (1962).

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[6] The court below was in error when it said that: "* * * the Board made no finding in this case that retirees are employees within the meaning of the Act." (A. 195 n. 14)

Collective bargaining is an on-going process continually reflecting developing trends in labor-management relations.[7] *Inland Steel Co. v. NLRB*, 170 F.2d 247, cert. denied 336 U.S. 960, spoke of "the increasing problems arising from the employer-employee relationship." It referred to this Court's decision in *Weems v. United States*, 217 U.S. 349, 373 (1910), wherein it was said that, "* * * a principle to be vital must be capable of wider application than the mischief which gave it birth." In *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 350 (1958) the Court construed the definition of collective bargaining and laid down two tests to be used in deciding whether the phrase, "wages, hours, and other terms and conditions of employment" of Section 8(d) made a particular subject one for mandatory bargaining: (1) Does the subject matter settle a term or condition of employment, or (2) Is it one which regulates the relations between the employer and the employees. Insurance benefits for retirees regulate relations between the employer and employees within the meaning of *Borg-Warner*. The retired employees' health plan also places a monetary value on past services and in this fashion settles a condition of employment between the employer and employees. The employer's payment of the premium is another form of compensation receipt of which has been deferred to a time when the retirees' needs are the greatest. The term "wages" includes pension and beneficial insurance rights for the purposes of collective bargaining, *Inland Steel Co.*

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[7] Illustrative of some of the subjects of major concern affecting labor relations today is the table of contents of *Collective Bargaining Today*, BNA (1970), Institute of Collective Bargaining and Group Relations: Medical and Hospital Costs; Conglomerate Mergers; Resolution of Manning Issues; The Multinational Corporation; Government Military Procurement; The Consumer and Environment.

v. NLRB, supra, at p. 251. In the instant case the lower court recognized that: "pensions and insurance benefits to be enjoyed by employees after retirement are 'wages' for the purposes of the statute, albeit deferred ones, and that insofar as they accompany a provision specifying a mandatory retirement age, * * * are also conditions of employment" (A. 190).

The Board, with court approval, has refused a rigid construction of the phrase "wages, hours and other terms and conditions of employment" set out in Section 8(d) of the Act. The phrase has been construed with reason and understanding and a correct appreciation of the expanding nature of the scope of the collective bargaining obligation under the Act.

C. ACTIVE EMPLOYEES HAVE A VITAL CONCERN IN THE BENEFITS PROVIDED FOR RETIRED EMPLOYEES.

1. The Board found that health insurance benefits for retired employees vitally affect employees in the bargaining unit and are, therefore, embraced within the employer's bargaining obligation (A. 38).[8] In *Teamsters Union v. Oliver,* 358 U.S. 283, this Court evaluated the effect upon employees of written lease agreements for vehicles which did not cover actual operating costs, and in *Fibreboard Paper Products Corp. v. Labor Board,* 379 U.S. 203, it had to reckon with the effect upon unit employees of a unilateral determination to subcontract bargaining unit work.

Bargaining about retirement benefits vitally affects active bargaining unit employees. Unions and employees

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[8] The Company's unilateral action in 1966 changed an agreement made earlier when some of the retirees were still on the active payroll within the collective bargaining unit (A. Gen. Co. Exhs. 2, 5; p. 56, 88, 118, 121).

want to be sure that bargained-for-benefits are received. Improving their economic security upon retirement is a continuing concern of all workers. "Promise of retirement benefits help to attract good workers and pay dividends to the employer in terms of longevity of service and favorable employee morale." [9]

Few subjects in recent years have engaged more time and attention of labor-management representatives than collective bargaining about pensions, medical care, and hospitalization coverage for active and retired employees. The active worker is concerned about the tremendous increase in the cost of health protection and its depressing effect upon his weekly earnings. He knows, however, that the improvement of medical and hospitalization benefits has a consequential effect when he retires. This improvement of benefits for the active worker induces beneficial changes for the retired worker as well.

Former Solicitor General Archibald Cox, while presiding as an arbitrator, expressed in this fashion the interest of active employees in seeing that negotiated pension increases would also be applied to the previously retired employee:

> "Nor was the union guilty of a breach of its fiduciary duties when it pressed for larger payments to retired pensioners instead of concentrating its full bargaining power in support of demands directly benefiting employees who were still in the bargaining unit. The union representatives and the current work force may well have been looking to the future. Each contract they are able to negotiate upon the principle that the liberalization of pension should extend to employees who have already retired may help to establish an accepted practice upon which the current em-

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[9] Note, *Pension Plans and the Rights of the Retired Worker*, 70 Colum. L. Rev. 909, 915 (1970).

> ployees may benefit after their retirement. Similarly, the union officers and members might believe that it would solidify and strengthen their organization to provide for the welfare of retired workers who had long held jobs that became part of the bargaining unit."
>
> (*United Drill and Tool Corporation*, 28 Labor Arbitration Reports (BNA) 677.)

The retiree must turn to his union to represent him when his retirement benefits are affected by inequities arising from inflation or other economic developments.[10] The union at the same time is constantly seeking to expand the scope of health insurance coverage for employees.[11] There is thus an interaction between one group and the other with advantages to both.

The constant interplay of these interests and their generation of ideas and programs to be initiated by unions affect simultaneously the active and retired worker. All of this suggests how closely allied are the interests of the active bargaining unit employees and the retired workers when it comes to a consideration of matters subject to the collective bargaining obligation of the Act. The renegotiation of insurance benefits for retirees is certainly no more "outside the range of matters on which the federal law requires the parties to bargain," *Teamsters Union v. Oliver*, 358 U.S. 283, 293, than the effect that the inadequate terms of a lease of a vehicle have on an active employee's wages. The question in *Oliver* was whether the fixing of a minimum rental to be paid by an employer

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[10] Recent commentators have suggested how low income groups are affected in "an era of general inflation" by the "rapidly rising cost of health care." Note, *Prepaid Group Practice*, 84 Harv. L. Rev. 887, 893, Feb. 1971.

[11] Bok & Dunlop, *Labor and the American Community*, p. 372 (1970).

for leased vehicles to be driven, not by his employees, but by owner-operators, could be subjected to collective bargaining. The inadequacy of the rental paid to an owner-operator "not only clearly bears a close relation to labor's efforts to improve working conditions but is in fact of vital concern to the carrier's employed drivers," *Teamsters Union v. Oliver, supra,* at 294. Mr. Justice Brennan, speaking for the Court, said:

> "* * * It is not necessary to attempt to set precise outside limits to the subject matter properly included within the scope of mandatory collective bargaining, cf. *Labor Board v. Borg-Warner Corp.*, 356 U.S. 342, to hold, as we do, that the obligation under § 8(d) on the carriers and their employees to bargain collectively 'with respect to wages, hours, and other terms and conditions of employment' and to embody their understanding in 'a written contract incorporating any agreement reached,' found an expression in the subject matter of Article XXXII [of the contract]. * * * And certainly bargaining on this subject through their representatives was a right of the employees protected by § 7 of the Act," (358 U.S. at 294, 295)

Confronted with the question of whether "contracting out" of unit work was a mandatory subject of collective bargaining in *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 211 (1964), this Court said:

> "* * * The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife. * * * To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace."

The Court declared also, 379 U.S. at 211: "While not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining.", citing *Labor Board v. American Nat'l. Ins. Co.*, 343 U.S. 395, 408 (1952).

The lower court was influenced by the absence of certain indicia of active employment status such as presence on the current payroll, performance of service, seniority, restrictions on other employment, and the right of recall to work (A. 195). Decisions of the Board in representation cases excluding retirees from participation in unit determination elections because of these factors were viewed by the court as inconsistent with the Board's decision in the instant case (A. 196, 197).[12] The criteria used by the Board, however, to determine eligibility to vote does not go to the heart of the matter which is whether bargaining about changes in retirement benefits of retired employees is within the contemplation of the statute because of the very real interest that active employees have in this subject.

The question presented here is not whether the broad definition of employee in Section 2(3) of the Act is

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[12] Board policy in representation cases excluding employees on retirement or those with little or no likelihood of recall from voting in representation elections, was in the court's judgment inconsistent with the Board's conclusion "that retirees should be included in the bargaining unit for the purpose of renegotiating their retirement benefits * * *" (A. 197). In finding that retirees are not employees the lower court relied upon two overruled decisions of the Board in representation cases: *Taunton Supply Corp.*, 137 NLRB 221, 223 (1962) (part-time workers who are social security annuitants excluded from unit), overruled in *Holiday Inn of Oak Ridge*, 176 NLRB No. 124 (1969) and *Denver-Colorado Springs Public Motor Way*, 129 NLRB 1184 (1961) (dual-function employee must perform more than 50 percent of his time in the unit to be included), overruled in *Berea Publ. Co.*, 140 NLRB 516, 519 (1963).

restricted by Section 8(a)(5) which makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of "his employees." The question rather is whether insurance benefits for retired employees should be included as a mandatory subject of collective bargaining for the reasons set forth in the Board's opinion. When the Company refused to meet with the Union it was avoiding its statutory obligation to bargain about changes in retirement benefits for the retired employees. The lower court ignored the interest of the active employees in the subject of retirement changes and the effect of the changes upon their interests. The Board's contrary construction of the Act is not precluded because the pronoun "his" precedes the word "employees" in Section 8(a)(5). Thus the Board said in *Houston Chapter, Associated General Contractors,* 143 NLRB 409, 412, referring to this Court's decision, in *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177 (1941), that:

> "* * * we do not deem the Supreme Court to have limited its definition of 'employees' to those individuals already working for the employer,"

The lower court's interpretation of Section 2(3) fastened a restriction on the meaning of the term "employees" which was specifically rejected in *Teamsters Union v. Oliver, supra,* as Mr. Justice Brennan made clear in *United States v. Drum,* 368 U.S. 370, 382, n. 26 (1962):

> "* * * *Teamsters Union v. Oliver,* 358 U.S. 283, did not, as appellees suggest * * *, hold that owner-operators are in any sense 'employees'. That case held that a bargaining unit including an overwhelming majority of concededly employed drivers of carrier-owned equipment was entitled, under § 8(d) of the National Labor Relations Act, * * * to bargain to impasse concerning minimum rentals to be received by owner-drivers. It was not necessary to determine whether

> the owner-drivers were 'employees' protected by the Act, since the establishment of the minimum rental to them was integral to the establishment of a stable wage structure for clearly covered employee-drivers. * * * "

The decision below repudiated the principle that collective bargaining "generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States," *Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346 (1944). This absorption principle extends the statutory obligation of the Company and the Union to bargain with each other about retirement benefits. The lower court's holding has seriously impeded the orderly development of collective bargaining by ignoring this principle and approving the Company's direct dealing with the retirees.

2. The lower court feared that permitting the Union to represent the retiree would create conflicts to the retiree's disadvantage and affect the Union's representation of bargaining unit personnel. The Union does represent retired employees in a number of important respects without measure of conflict. The Company's pension agreement establishes the Union's right to pursue through appeal stages and into arbitration any differences which arose between the Company and a retiree concerning his age, years of continuous service, the cause of his disability, and disqualification, if any, from continuing to receive a disability pension in the event the retiree engaged in other employment (A. Gen. Co. Exh. 4, 61, 81, 82; 120). In addition, the Union had the right to join in the selection, with the Company, of a neutral physician if there was a dispute over a retiree's total or permanent disability (A. Gen. Co. Exh. 4, 83). Indeed, without the Union

the retiree was without any representation in these disputes arising out of the pension agreement. The Union's representation of retired workers in these matters was not in conflict with its representation of the active employees.

The court, moreover, was concerned about problems not related to the issues before it. For example, it expressed the opinion that if retirees were given "the bargaining power" they "would lose their economic security, for just as surely as an employer may increase benefits, in bargaining, he may take them away" (A. 200).[13] The retirees did not seek "bargaining power". It was the Union which sought to negotiate a change in their health insurance protection using its bargaining power because of the importance of the subject to both active and retired employees. The court's judgment was also affected by its belief that the Union would trade benefits of retirees who have "no voting power" for gains to active union "constituents" (A. 200). There is no support in the record for these notions which do not face up to the reasons upon which the Board came to its judgment. Unions constantly grapple with issues which may be of more or less importance to one class of employees than another. It is not the problem but its fair and effective resolution through collective bargaining, which becomes the joint concern of labor and management. Thus the Board was correct when it stated, concerning the precise issue in this case, that:

> "With respect to new problems which arise under a health insurance plan for retired employees, collec-

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[13] The court's suggestion that any attempted interference with retirees' bargained for benefits would be subject to a Section 301 action, 29 U.S.C. 185(a), is hardly realistic. Section 301 provides a remedy for breach of a collective agreement and was successfully used to require an employer to pay premiums on life insurance contracts of retired employees. *Upholsterers' Local 307 v. American Pad & Textile Co.*, 372 F.2d 427 (CA-6, 1967). But litigation for retired persons or a class action in their behalf is no substitute for collective bargaining.

tive bargaining is not only a suitable method for exploring different solutions, but it is probably the *most rational and effective* method." (A. 41, emphasis added.)

3. The enactment of Medicare presented a new problem and focused the attention of all workers upon health care services provided by private plans. The Company's pension program gave an employee, whose retirement was mandatory after July 28, 1964, a slim margin for major medical costs. In August, 1967, a year after Medicare became effective, an employee with 25 years of service would receive a monthly pension of about $64.00.[14] If he elected to participate in the insurance program provided by the Company it would cost $11.41 a month for the retiree and his spouse. The Company contributed $2.00 toward premium cost, resulting in a modest pension check of about $54.00 per month (A. 56, 67).

A budget for moderate living standards in 1966 for a retired couple in reasonably good health was $3,900. The medical care component alone of this budget was about $284.[15] Additional health care aid for persons in low retirement income groups was needed. Medicare made such aid possible by providing a basic plan of protection against the cost of hospital and related care for those 65 and over, and a voluntary supplemental plan covering payments for physicians and other medical and health services. The supplementary medical insurance program requiring separate enrollment covered 80 percent of the reasonable charges for physicians, home health

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[14] A retiree would receive $2.50 per month multiplied by the number of years of service before June 28, 1962, and $2.80 a month multiplied by the number of years of service for the Company after June 28, 1962 (A. Gen. Co. Exh. 4; 67, 120).

[15] Brackett, *A New Budget For a Retired Couple*, 91 Monthly Lab. Rev., p. 33, 35, June 1968.

care and numerous miscellaneous medical and health services, 42 U.S.C. 1395(k), 1395(l).[16]

The impact of these changes brought about by enactment of public law made it important to adjust the Company's plan without disadvantage to the retirees. Because of this the Union asked the Company in November, 1965 to amend its plan to add services not supplied by Medicare (A. 122, 154). The necessity to coordinate Medicare and its supplementary coverage with existing private plans created an immediate need for effective resolution without disadvantage to the retirees. Bargaining for this purpose could have taken many forms.[17] The Board very properly referred to the extent of bargaining in this context as shown in the lower court briefs *amici curiae* of the United Steelworkers, United Automobile Workers and Amalgamated Transit Union (A. 42). Under these circumstances the Board said:

> "* * * to deny collective bargaining a role in the development of health benefits plans for retired employees might undermine their viability. These private plans provide an important supplement to governmental social welfare programs, and an effective method of dispute settlement will contribute to their purposefulness." (A. 41)

Both the Company and the Union recognized the importance of bringing the negotiated plan in line with Medicare. In rejecting the Union's request to bargain about this, however, the Company refused to allow "a

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[16] Due to higher costs of medical care and the greater use of medical services the monthly premium for each individual involved will be increased to $5.60 effective July 1, 1971. CCH, *1971 Social Security and Medicare,* ¶ 635, p. 192.

[17] Foust, *Effect of Medicare On Privately Bargained Plans,* 19 New York University Conference on Labor Law, 273-285 (1966); Muntz, *Bargaining For Health,* p. 90, 91, 92.

problem of vital concern to labor and management," *Fibreboard Paper Products Corp., supra,* 379 U.S. at 211, to be discussed "within the framework established by Congress as most conducive to industrial peace."

D. THE BOARD'S DECISION IS SUPPORTED BY JUDICIAL CONSTRUCTION OF SECTION 302 OF THE ACT.

The Board's conclusion that retirement benefits are embraced by the bargaining obligation of Section 8(a)(5) is based in part on decisions construing Section 302 of the statute, 29 U.S.C. 186 (App., *infra,* pp. 37, 38). Section 302 makes it a misdemeanor for an employer to pay and a union representative to receive money except that payments made to a jointly administered pension or welfare trust for the sole and exclusive benefit "of the employees" are exempt.[18] Appellate courts have construed Section 302(c)(5) to cover both "current employees and persons who were covered current employees but are now retired." *Blassie v. Kroger Co.,* 345 F.2d 58, 70 (CA-8, 1965); *Garvison v. Jensen,* 355 F.2d 487 (CA-9, 1966). The lower court was "unpersuaded" by these decisions because "Section 302 is a criminal provision" (A. 194). That consideration does not provide adequate grounds for rejecting court decisions construing parallel language in the Act.[19]

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[18] The pension and retirement benefits involved here were not negotiated under § 302 of the Act.

[19] Section 302 of Title III establishing restrictions on payments of money to employee representatives, 29 U.S.C. 186, is not a separate unrelated matter. In *Wm. Wolf Bakery, Inc.,* 122 NLRB 630 (1958) the Board accepted the interpretation of the Department of Justice in holding valid, for contract-bar purposes, an agreement providing for the checkoff of union initiation fees, dues, and assessments. See also, *Int'l. Union Mine, Mill & Smelter Workers v. American Zinc,* 311 F.2d 656 (CA-9, 1963); *NLRB v. Food Fair Stores, Inc.,* 307 F.2d 3 (CA-3, 1962).

In *Blassie v. Kroger Co.*, the district court, 225 F. Supp. 300 (E.D. Mo.) held that Section 302(c)(5) restricted use of fund assets for the sole benefit of active employees, and that retirees could not be the beneficiaries of a trust for medical and insurance benefits. The court of appeals (in an opinion by then Circuit Judge Blackmun) reversed the district court's construction of the statute that current enjoyment of benefits under Section 302(c)(5) was restricted "to persons in active employment." The court reasoned as follows (345 F.2d at 69):

> "c. * * * the presence of these two requirements—payment by the employer and current employment—does not mean that benefits which flow from these contributions of the employer (and from any other receipts of the Trust) are to be confined in their enjoyment to the period of the employee's active employment. There is nothing in the statute which clearly prescribes this and we see nothing in its language which could support so restrictive an inference.
>
> "d. The statute by its very language obviously contemplates the enjoyment of certain benefits after an employee's retirement or while he is inactive. It speaks of pensions on retirement or death, of compensation for illness resulting from occupational activity, of unemployment benefits, of life insurance, of disability and sickness insurance, and the like. And § 302(c)(6) refers to 'severance or similar benefits.'
>
> "e. Any plan for the health and economic well-being of employees, whether it be one gratuitously granted or one hammered out by hard bargaining, would normally be expected to embrace the crises of unemployment, retirement and disability, as well as those of the better times of active employment. An opposite result, with benefits available only when the weather is fair and the needs are less, would be ironical in application and, we feel, should not be

reached without a clearer indication of congressional intent than we have here. The Supreme Court, in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 468 * * * (1960), observed, 'It is a commonplace of modern industrial relations for employers to provide security for employees and their families to enable them to meet problems arising from unemployment, illness, old age, or death.' The trend of welfare plans toward the inclusion of retired persons is a fact of today's industrial life which needs no documentation here.

"f. * * * Benefits after retirement are not an evil at which the statute was directed."

The court also stated (345 F.2d at 70):

"* * * All we do in this civil proceeding is to construe the term 'employees' to mean covered current employees and persons who were covered current employees but are now retired. This is not non-literal construction but one which, we think, comports with the ordinary and literal meaning of the term." [20]

In *Garvison v. Jensen* the Ninth Circuit Court of Appeals said (355 F.2d 487, 488):

"* * * We see nothing in the language or purposes of section 302(c)(5) which would require that medical and hospital benefits for retired employees be financed by employer contributions made during the period of an employee's active service, rather than being financed in whole or in part by current employer contributions."

The clear holding of these cases is that retired persons are not to be denied welfare benefits provided by payments to a trust meeting the qualifications of Section 302(c). The phrase "for the sole and exclusive bene-

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[20] Accord, *Local 688, Teamsters v. Townsend*, 345 F.2d 77 (CA-8, 1965) holding that where the trust agreement so provided, "benefits after retirement * * * are not prohibited or illegal under § 302(c)(5)," 345 F.2d at 78, 79.

fit of the employees" (302(c)(5)) is thus held to include retired persons. In this respect unions, of course, do represent "retirees."

The lower court also rejected interpretations of the word "employee" by the Internal Revenue Service (A. 194). The court of appeals in *Blassie*, however, found them supportive of the result reached in that case. The court said (345 F.2d at 69):

> "g. The requirement of § 302(c)(5)(C) that payments intended for pensions or annuities flow into a separate trust administered exclusively for that purpose contains no contrary implication apparent to us. The requirement of separateness, and, for that matter, the requirement of exclusiveness of benefit for employees tie in, not unexpectedly, with those provisions of the Internal Revenue Codes exempting qualified pension and welfare trusts from income taxation. * * *"

A trust, forming part of a pension plan, must be "for the exclusive benefit" of employees or their beneficiaries to be qualified under Section 401 of the Internal Revenue Code, 26 U.S.C. 401, and exempt from taxation under Section 501(a). The Internal Revenue Service has ruled that a qualified plan "is for the exclusive benefit of employees or their beneficiaries even though it may cover former employees as well as present employees * * *." 26 C.F.R. 1.401-1(4). The 1962 amendment, Pub. L. 87-863, 26 U.S.C. 401(h) specifically provides that under regulations of the Secretary a pension plan may provide for payment of hospitalization and medical expenses of "retired employees." [21] The absence of legislative history

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[21] The Service has held that the term "employee" includes "retirees" who were formerly "common-law" employees if the coverage provided for them is based upon their former services as employees. Rev. Rul. 68-577, Internal Revenue Bulletin 1968-2, p. 52.

was referred to also in *Blassie v. Kroger, supra,* when the court said that the failure specifically in the Congressional debates to link retired persons to health care was not "any indication of an intent to deprive them of such benefits. Indeed, the opposite inference—that they are not mentioned because no one conceived them to be excluded—is reasonable," 345 F.2d at 70. If Congress had intended to exclude retirees as current beneficiaries of pension and insurance funds in Section 302 it could have done so explicitly. See *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17, 29 (1962).

E. THE COMPANY UNILATERALLY CHANGED A PROGRAM OF RETIREMENT BENEFITS BY NEGOTIATING DIRECTLY WITH THE RETIREES.

Despite the imperative need for constructive collective bargaining to resolve the issues raised by Medicare, the Company refused to bargain with the Union and then unilaterally changed its insurance plan for the retired employees. The decision below is erroneous in its holding that this was "not the case * * * of an employer bypassing the union and bargaining directly with active employees" (A. 191, n. 9). This holding does not square with the undisputed facts found by the Board (A. 45-46).

The Union initiated discussion in November, 1965 to coordinate Medicare with the Company's insurance program. The Company made its first response in March, 1966 and later reconsidered because of the Union's justifiable criticism of a proposal which did not protect pensioners and their wives under age 65 (A. 14, 126). A few days later the Company told the Union that it would deal directly with the employees (A. 28).

The Company's direct dealing forced retirees to make a hard choice. They could, (1) continue coverage under the existing plan without duplication of benefits paid for

under Medicare, or (2) discontinue their enrollment in the negotiated plan, in which event the Company would contribute $3.00 per month to cover the cost of supplemental Medicare. About 15 of the retired employees cancelled their participation in the negotiated health insurance plan (A. 28) as a result of the Company's decision. The fact that retirees were allowed to continue existing coverage did not make the proposal any the less a *new* Company insurance program to replace the one negotiated with the Union in 1964. When assistance of the Union was most needed to advise retirees and their wives, "the Company refused to bargain with the Union * * *" (A. 186).

This was a violation of Section 8(a)(5) and (1) of the Act (App., *infra*, p. 34). An employer's unilateral change in a negotiated insurance plan violates the statute, *NLRB v. Katz*, 369 U.S. 736, 743 (1962). *Katz* is instructive because after the union in that case had proposed modifications of a sick leave plan, the employer without notifying the union, announced changes which benefited some employees but adversely affected others. This Court said:

> "* * * Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." (369 U.S. at 747)

See also, *NLRB v. General Electric Co.*, 418 F.2d 736, 746 (1969), cert. denied 397 U.S. 965 (1970). There the Second Circuit Court of Appeals said:

> "Ordinarily, the matter would be relatively simple; it appears well settled that insurance is a mandatory subject for collective bargaining, and the employer violates section 8(a)(5) of the National Labor Relations Act by refusing to bargain over it (Citing

cases). He would, of course, also violate the Act if he unilaterally changed the conditions or terms of employment. See *NLRB v. Katz*, 369 U.S. 736 (1962) * * *."

An employer is not free to negotiate directly with employees or make unilateral changes in a negotiated insurance plan, *NLRB v. Scam Instrument Corp.*, 394 F.2d 884, 887 (CA-7, 1968), cert. denied 393 U.S. 980 (1968). The court said that the benefits were not subject to the unilateral reduction which *Scam* effected, "without notice to or consultation with the Union, by means of the rider it requested of its insurance carrier." It held: "We are of the opinion that the Board was correct in concluding that the unilateral change in benefits effected by Scam constituted an unfair labor practice violative of Section 8(a)(5) and (1) and of Section 8(d) of the Act." In *NLRB v. Huttig Sash & Door Co.*, 377 F.2d 964, 967 (CA-8, 1967), the court enforced an order of the Board finding the employer to have violated Section 8(a)(5) and (1) of the Act by a unilateral modification of a contract in mid-term without following the procedures of Section 8(d) of the Act. The court followed *NLRB v. Katz*, 369 U.S. 736, 743 (1962) and *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 209-210 (1964).

In the instant case the Company's unilateral action was only one way of bringing its plan in line with Medicare. The full range of other possibilities was never discussed with the Union and retirees were denied the advantage of union representation to explore the alternatives that were available.

Accordingly, neither the record nor the court's interpretation of the statute justifies the result reached by the court of appeals in this case. The Board was correct in holding that the subject matter of health insurance and

retirement benefits of retired employees is properly embraced by Section 9(a) of the Act since it relates to "rates of pay, wages, hours of employment, or other conditions of employment," and that retired employees are "employees" within the meaning of the statute for the purposes of bargaining about changes in their retirement benefits.

CONCLUSION.

The judgment of the court of appeals should be reversed and the case remanded with instructions to enter a decree enforcing the Board's order.

Respectfully submitted,

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April, 1971.

APPENDIX.

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., 151, *et seq.*) are as follows:

DEFINITIONS.

Sec. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

RIGHTS OF EMPLOYEES.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid

or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES.

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this

Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act, (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing:

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

* * * * *

REPRESENTATIVES AND ELECTIONS.

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * * *

Relevant provisions of Title III of the Labor Management Relations Act, 29 U.S.C. 186, are as follows:

Sec. 302 (c) The provisions of this section shall not be applicable

* * * * *

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal

office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training program: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.

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Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 910 and 961

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1, *Petitioner*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, *ET AL.*

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, *ET AL.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND FOR THE INTERNATIONAL UNION UAW AS AMICI CURIAE

Pursuant to Rule 42 of the Rules of this Court the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the International Union UAW, file this brief *amici* in support of the position of the petitioners with the consent of the parties.

INTEREST OF THE AMICI

The AFL-CIO is a federation of one hundred and twenty-one affiliated labor organizations having a total membership of approximately thirteen and one half million working men and women. It is thus the majority spokesman for organized labor. The International Union UAW, with a membership of over one million five hundred thousand is the nation's largest industrial union.

The instant case presents a major question as to the proper scope of bargaining on a basic issue—retirement benefits. This major question has been erroneously decided. The nature of the subject matter demands that bargaining over retirement benefits be a continuous process. The lower court's opinion (A. 183-200), however, creates an artificial restriction on bargaining which will have a substantial adverse practical impact on labor-management negotiations involving this subject. The decision below is also unsound in its overall approach. It pretermitted bargaining covering a subject of importance to employees within the unit, with the acknowledged representative of those employees, because it was determined that the result would have an impact on other persons. If this view gained acceptance countless subjects of discussion important to labor and management will be removed from the bargaining table if either party declines to discuss it, thereby narrowing the scope of bargaining to a point at which the ultimate aims of the National Labor Relations Act would be thwarted. Collective bargaining is the primary function of the Federation's affiliates and the UAW. Thus the *amici's* interest in the instant proceeding is manifest.

ARGUMENT

In the instant case the National Labor Relations Board determined that the National Labor Relations Act imposes a duty on employers to bargain with the acknowledged representative of their active employees concerning changes in benefits payable to their retired employees. As one of two separate grounds of decision the Board concluded that:

> "Independent of our finding that retired workers are 'employees' we also conclude that the subject of retirement benefits for retired employees is embraced by the bargaining obligation of the statute because it vitally affects active bargaining unit employees." (A. 38).

The Sixth Circuit, however, in overturning the Board's decision, declared that the Act "limits the employer's bargaining obligation to 'his employees' . . . who are in the bargaining unit." (A. 195-196). In light of these conflicting rulings regarding the scope of the statutory duty to bargain,

the case turns, as the Company acknowledges, on whether:

> "Section 8(a)(5) specifically provides that mandatory bargaining is limited to 'employees' of the particular employer, and, by reference to Section 9(a), further restricts bargaining to the 'unit' established as appropriate for such purposes." (Co. Br. in Opp. No. 910, p. 7).

The restrictive view of the scope of the mandatory subjects of bargaining championed by the Company and adopted by the court below is based on a failure to distinguish between two analytically distinct aspects of the bargaining obligation imposed upon employers, is contrary to this Court's decision in *Teamsters Union* v. *Oliver*, 358 U.S. 283, is supported neither by the language of the Act nor by the prior precedents on which the Company relies, and produces results which are contrary to the basic policy of the Act—as we shall now demonstrate.

1. The duty to bargain in §8(a)(5) has two elements: first, to recognize the "individual or labor organization . . . designated or selected . . . [as] the exclusive representative . . . for the purposes of collective bargaining by the majority of the employees in [an appropriate] unit"; and second, to bargain collectively with that representative in the manner defined by §8(d) which provides:

> ". . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder."

In the present case, there is no question that the Company had an obligation to recognize the Allied Chemical Workers' Union as the exclusive bargaining representative of the Company's employees; this is true whether or not the retirees are employees, for the actives certainly are. Indeed, the Company does not deny that it had the obligation to recognize the Union as the representative of the active em-

ployees. But the Company argues that it was privileged not to bargain with that representative about the benefits to be paid to retirees. This is not a question of recognition but of the scope of the content of collective bargaining. Thus, the pertinent language to be construed here is that of §8(d), not that of §8(a)(5). In terms of the precedents in this Court, the issues are those considered in *Teamsters Union* v. *Oliver*, 358 U.S. 283, and *Fibreboard Paper Products Corp.* v. *Labor Board*, 379 U.S. 203, not those involved in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575.

The definition of "employee" and the concept of bargaining unit are relevant, indeed indispensable, for determining the first of these duties, that is, the duty to recognize. As stated in *Phelps Dodge* v. *Labor Board*, 313 U.S. 177, 192:

> "In determining whether an employer has refused to bargain collectively with the representatives of 'his employees' in violation of §8(5) and §9(a), it is of course essential to determine who constitute 'his employees.' One aspect of this is covered by §9(b) which provides for determination of the appropriate bargaining unit."

Both the phrase "his employees" in §8(a)(5) and the concept of appropriate bargaining unit in §9(a) are inherent in the majority principle which governs recognition of representatives. The answer to the question "majority of what" is "his [the employer's] employees in an appropriate bargaining unit."

Those terms, however, have nothing to do with the subjects about which the representative and the employer must deal once the identity of the representative is determined. The definition of the content of bargaining in §8(d) does not even contain the words "appropriate bargaining unit." And, of course, logical analysis does not compel the conclusion that the duty to bargain about "wages, hours and other terms and conditions of employment" must be rigidly restricted to regulation of the employer's dealings with the unit employees. Indeed, and to us this is the essence of the matter, such a rigid rule would be profoundly destructive

of the paramount policy of the Act—"to encourage the practice and procedure of collective bargaining," §1. For that policy requires that "problems of vital concern to labor and management [be brought] within the framework [of collective bargaining] established by Congress as most conducive to industrial peace," *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 212. And such problems are not cabined according to the electoral districts declared to be bargaining units.

This insight into the practical realities of collective bargaining governed this Court's construction of §8(d) in *Teamsters Union* v. *Oliver*. The holding of that case was subsequently explained by its author, Mr. Justice Brennan, in terms which are particularly instructive here:

> "*Local 24 of Inter. Broth. of Teamsters, etc.* v. *Oliver*, 358 U.S. 283, did not, as appellees suggest * * *, hold that owner-operators are in any sense 'employees.' That case held that a bargaining unit including an overwhelming majority of concededly employed drivers of carrier-owned equipment was entitled, under §8(d) of the National Labor Relations Act, * * * to bargain to impasse concerning minimum rentals to be received by owner-drivers. It was not necessary to determine whether the owner-drivers were 'employees' protected by the Act, since the establishment of the minimum rental to them was integral to the establishment of a stable wage structure for clearly covered employee-drivers. See *id.*, at 294-295." *United States* v. *Drum*, 368 U.S. 370, 382, n. 26.

Similarly, it is not necessary to determine in this case whether retirees are employees protected by the Act, since, as the Board properly found, see pp. 12-15 *infra*, the establishment of their benefits is "integral to the establishment of" retirement benefits of active employees.

2. The Company claims that "the decision of the court below finds solid support" in five particulars (Co. Br. in Opp. in 910, p. 10). We now show that each of these is without merit.

Point 1 is that support is to be found in:

> "The language of Section 8(a)(5) which restricts the employer's bargaining obligation to 'his employees' and further makes the obligation subject to Section 9(a)." (Co. Br. in Opp. in 910, pp. 10-11).

But this misreads the "language of Section 8(a)(5)":

> "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of §9(a)."

As already noted, p. 4 *supra*, the office of the language in the body of §8(a)(5) is to declare with whom the employer must bargain: "the representative of his employees". Moreover, the final clause of that section ("subject to the provisions of §9(a)") was necessary, because the term "representative" as defined in §2(4) is not limited to the exclusive bargaining representative, see, *U.S.* v. *Ryan*, 350 U.S. 299. If the duty imposed by §8(a)(5) had not been made "subject to the provisions of §9(a)," employers would be required to bargain also with a representative chosen by a minority within a unit, even if a majority in that unit had chosen some other representative, thereby undermining the exclusive status of the majority representative. Thus, the reference to §9(a), like the preceding portions of §8(a)(5), is directed solely toward providing the answer to the question "who is the employer obliged to recognize?"[1]

---

[1] The legislative history of the clause, though sparse, confirms this analysis. This language appeared in the original version of what became § 8(5) of the Wagner Act which was presented to Congress by Francis Biddle, then Chairman of the pre-Wagner Act National Labor Relations Board:

> "The practical side of majority rule is that neither can an employer deal with any chance of success with a group of representatives nor can any union stand any chance of success if there are other competing unions in the field. It is absurd to talk about trying to enter into a collective agreement with half a dozen people with divergent views and different points of view in the field; and, just as the employer has the unity and power of the individual, so labor should have the unity and power of the single representation. So much for majority rule.
>
> "Now, who is to determine the unit in which the majority should govern? That seems to me to be well handled in this bill * * * and although it does put greater power into the hands of the board * * * it is subject to review by the courts and it seems to me that is essential that it should remain in the board.

Yet the Company's point 2 (Co. Br. in Opp. in 910, pp. 10-11) is that selected passages from four opinions, *Phelps Dodge, supra,* 313 U.S. at 192; *Page Aircraft,* 123 NLRB 159, *Piasecki Aircraft,* 123 NLRB 348, *enforced* 280 F.2d 575 (C.A. 3), *certiorari denied,* 364 U.S. 933, and *Briggs Mfg.,* 75 NLRB 569, support its construction of §8(a)(5). The only point made by these four passages is that a controversy as to majority status must be settled by determining the preferences of employees of the employer in question and not of employees generally. This is a point which we readily accept,[2] but one which does not meet the issue

---

"I would like to say one specific thing about the bill before I leave the subject of collective bargaining: That is the corresponding duty on the part of the employer to bargain collectively. * * *

"I suggested to the committee and I think that the Senator [Mr. Wagner] has taken cordially to the suggestion that there be inserted as subdivision (5) of section 8 the following clause —section 8, you will remember, outlines what shall constitute unfair labor practices. It specifies that—

'It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7—'

"And so on, and the last subdivision of that section provides that you must not discharge or discriminate against an employee who has filed charges or given testimony. Now, there at that period I would add the following as subdivision (5):

'To refuse to bargain collectively with the representative of his employees subject to the provisions of 9(a)'

"*and section 9(a) is the section defining majority rule,* that the specific matters are that it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of the majority, and as I have said, I think it is dangerous to imply anything in a bill." II Legislative History of the National Labor Relations Act of 1935, pp. 2649-2650 (emphasis supplied).

There is no suggestion that Mr. Biddle's proposal that the employer's duty to meet with the exclusive majority representative of his employees be expressly declared in the law he was seeking to limit the scope of bargaining subjects or to protect persons *outside* the bargaining unit. Nothing further was said about this clause in the hearings or the floor debates; and it was left unchanged by the 1947 and 1959 amendments.

[2] Of course, we doubt that even the Company would insist that §8(a)(5) is to be read restrictively in all instances. Thus, where a multi-employer unit is appropriate, bargaining must be with the representative of a majority of "their" employees. And where the unit is less than employer-wide, the representative will not necessarily have a majority of "his" employees.

here which is whether bargaining about persons outside the unit is a mandatory subject. This distinction between recognition questions, and questions concerning the content of bargaining, is central to the instant case. And as we have shown, p. 4 *supra,* the very passage from *Phelps Dodge* on which the Company relies, demonstrates that the "his employees" phrase in §8(a)(5) deals only with the element of recognition. The *Page Aircraft* and *Piasecki Aircraft* cases also use this language solely in a recognition context.[3] The *Briggs* case, *supra,* is even further afield, for it arose under §8(a)(4), and its reference to the same language, merely follows *Phelps Dodge* in *dictum.*

The Company next relies (Co. Br. in Opp. in 910, p. 11) on the language of § 9(a) which allegedly restricts bargaining to the "unit appropriate for such purposes." There is no such language.[4] We have already noted that insofar as §9(a) is incorporated in §8(a)(5), which is the section the Company is charged with violating, it relates only to the recognition issue and does not bear on the content of the bargaining obligation.

The relevance of the Company's point 4 (Co. Br. in Opp. in 910, p. 11) that retirees would not be permitted to vote in a Board representation election, depends on the basic con-

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[3] We do not wish to be understood as accepting either the reasoning or the result in *Page Aircraft.* In the course of its decision in *Page Aircraft* (123 NLRB at 163 n. 5), the Board said:

> "The antidiscrimination provisions refer to 'employees' generally, whereas unlike these provisions, §8(a)(5) contains specific language requiring an employer to bargain for 'his' employees."

But contrary to this passage, there is *no* "specific language" in § 8(a)(5) which so requires. That section provides only that the employer shall bargain with "the *representative* of his employees." Indeed, under the Act an employer bargains only for himself and with or against his employees' representative. He does not under any circumstances bargain "for" his employees. Because of such faults of analysis *Page Aircraft* has been overruled in its pertinent aspect by *Chemrock Corp.,* 151 NLRB 1074, 1080, n. 8.

[4] The pertinent portion of § 9(a) reads:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . ."

tention that bargaining can affect only those employees who are in the bargaining unit and therefore have a voice in selecting the representative in question. But this premise is refuted by the holding in *Oliver*, 358 U.S. at 293-295. Moreover, it is inconsistent with the decisions[5] which hold that the hiring hall is a mandatory subject of bargaining since persons who have not previously been employed are not in the bargaining unit and are ineligible to vote. Similarly, the employees of a potential subcontractor are not eligible to vote in an election to determine the representative of the employees of the potentially subcontracting employer; yet they are affected by bargaining about subcontracting which *Fibreboard* holds is mandatory, 379 U.S. at 210-213.

Finally, the Company cites *Mine Workers* v. *Pennington*, 381 U.S. 657, 666, as holding that bargaining must be conducted on a "unit by unit" basis; and the *I.L.A.* cases (*I.L.A.* v. *NLRB*, 277 F.2d 681 (C.A.D.C.) and *Douds* v. *ILA*, 241 F. 2d 278 (C.A. 2)), for the proposition that "the scope of the bargaining unit limits and controls the bargaining process," (Co. Br. in Opp. in 910, p. 12).

We submit the Court did not intend the term "unit" as used in *Pennington* to encompass the full range of possibilities, as set forth in § 9(b) of the Act[6] but referred only to employer-wide and multi-employer units.[7] *Pennington* was, after all, an antitrust case involving multi-employer bargaining, so that the lesser bargaining units described in § 9(b)(1) were wholly irrelevant And the focus of the opinion is, therefore, on the danger that the union would, by agreement, give preference to one group of employers over another group (381 U.S. at 668-669). Indeed, the sen-

[5] *NLRB* v. *Houston Chapter Associated General Contractors*, 349 F. 2d 449 (C.A. 5), *certiorari denied*, 382 U.S. 1026; *NLRB* v. *Tom Joyce Floors*, 353 F. 2d 768 (C.A. 9); cf., *Local 357 Teamsters* v. *Labor Board*, 365 U.S. 667, 676-677.

[6] "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

[7] Compare the Court's use of the term later in the opinion:

> "It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy." 381 U.S. at 668.

tence immediately following that which the Company quotes, shows by its reference to "the favored employers," that the *Pennington* opinion was not concerned with separate bargaining units of a single employer. Finally, the Board cases cited in *Pennington's* discussion of "the national labor policy" all deal with multi-employer situations. And the discussion of those cases plainly supports our reading of the opinion's references to "unit."

The rule set forth in those cases, as stated by the Court, is that, "So far as the employer is concerned it has long been the Board's view that an employer may not condition the signing of a collective bargaining agreement on the Union's organization of a majority of the industry," (381 U.S. at 667). This Board view was of particular relevance in the antitrust context of *Pennington* because the employer's interest in making such demands is to protect "his competitive position" (381 U.S. at 666). In contrast, there is no relevance for antitrust policy in the rule the Company seeks to read into *Pennington*. Moreover, as the Court noted approvingly, *Newton Chevrolet*, 37 NLRB 334, 337, and its companions, prevent "frustration of the fundamental purpose of the Act, to encourage the practice of collective bargaining" (381 U.S. at 667). But the rule which the Company would extract from *Pennington* would seriously impede collective bargaining, see, pp. 12-15 *infra*. In addition, *Pennington* understood the duty to bargain "unit-by-unit" to exist for the benefit of the employees within the unit:

> "The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant, without being straitjacketed by some prior agreement with the favored employers." 381 U.S. at 666.

Yet, under the Company's expansive reading of *Pennington*, unit employees would lose their § 7 right, *Oliver*, 358 U.S. at 295, to bargain about the full range of subjects vitally affecting their interests if such bargaining affects individuals who are outside the unit.

The *ILA* cases (both of which arose out of a single set of circumstances) do not conflict with our theory. The union made no claim there that its demand bore on the wages, hours or working conditions of the employees in the certified unit, rather its demand admittedly was for representational rights *as such* which are not within § 8(d). Under *Labor Board* v. *Borg-Warner,* 356 U.S. 342, therefore, the union's insistence on recognition in some other unit as a condition of entering into an agreement in the certified unit was a violation of the Act.[8] Thus the *ILA* cases merely illustrate that it is essential in characterizing bargaining demands, and evaluating the parties rights and duties with repect thereto, to preserve the distinction which we have emphasized herein between the two separate issues which arise under § 8(a)(5), see, pp. 3-5 *supra.*

The foregoing demonstrates that *ILA* is not authority for the restrictive view of § 8(d) adopted by the court below. Nevertheless, since it can be done briefly, it should be pointed out that the rationale of the *ILA* opinion is unsound, and should not be accepted, even *arguendo,* by this Court. There is no basis in the Act for the reasoning that the ILA's insistence on its demand was unlawful merely because it would "vitiate the Board's certification" (118 NLRB at 1491). One example will suffice to show the incongruous results which that theory produces. This Court has repeatedly recognized (most recently in *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 596-597, following *Mine Workers* v. *Arkansas Oak Flooring Co.,* 351 U.S. 62) that the Board's certification processes are not exclusive, and that § 8(a)(5) imposes an obligation on employers to recognize the representative "designated or selected" by the majority. The *ILA* doctrine limits that §8(a)(5) duty as declared by this Court. It forbids a union which is once certified in a small unit from insisting upon recognition in a broader unit even if the union enjoys a clear majority in the latter (118 NLRB at 1490). This accords certifications, which were never intended to em-

[8] The ILA itself recognized this in its brief to the D.C. Circuit after the Board's decision, where it asserted only that it had not *insisted* on a contract recognizing it as the representative of the employees outside the certified unit, see, Brief of Petitioner, CADC No. 14985, p. 20-26.

body an absolute and unchangeable ideal basis for bargaining (see, e.g., *Motts Supermarkets*, 182 NLRB No. 19, 74 LRRM 1023 n.3), an independent force for which there is no statutory warrant. For the purpose of § 9(b) is to provide a mechanism to set collective bargaining in motion); not to restrict its scope.

3. Since, as demonstrated above, the controlling legal principle here is that stated in *Oliver* all that remains is to show that bargaining on the benefits to be paid retirees is "integral to the establishment" of the presently active employees' retirement benefits.

The Company argues that:

> "The theory that bargaining for retirees is necessary to protect the bargaining interests of 'active' employees in their own retirement benefits is conceptually false . . . There is nothing to suggest that active employees are handicapped or hampered in any degree *in negotiating their own retirement benefits by their inability to demand renegotiation of the benefits of those who have already retired.*" (Co. Br. in Opp. in 910, p. 9, emphasis in the original).

It is the Company's argument which is conceptually and factually false. For the point of the matter is that active employees would be hampered in negotiating their own retirement benefits by a rule which prohibited their represenative from demanding changes in *their* benefits after *they have retired.* And the Sixth Circuit's decision establishes just such a prohibition. Active employees do not stay active forever, eventually they become retirees. Thus, what is at stake here is not the right of a static group of actives to bargain about the benefits of a static group of retirees; rather it is the right of a changing group of actives to insist on a process of continuous negotiation on the ground that it alone is suitable to dealing with the manifold problems incident to the payment of their future benefits for work they have performed, cf, *Inland Steel Co.* v. *NLRB*, 170 F.2d 247, 253 (C.A. 7), *certiorari denied*, 336 U.S. 960.

The actual value of his future benefits to the retiree when he becomes entitled to them is dependent upon many condi-

tions and circumstances which the bargaining parties cannot anticipate and over which they have no control. Monetary inflation is one of these. Public law is another. There is an intimate and unavoidable interrelationship between the negotiated benefits and those which the retiree receives by virtue of public law. The shifting levels of Social Security payments and Medicare benefits are obvious examples. It would not be even theoretically possible for unions and employers to anticipate the nature and level of public benefits which retirees can expect and duplication of which would create costs to the employer without commensurate value to the retiree. Who, for example, in negotiating retirement benefits during, say the first 10 years after *Inland Steel,* could have anticipated the enactment of Medicare or its precise form; and who can tell today how much Social Security eligibles will receive monthly in 1980? To expect the parties to plan for such contingencies is, in Justice Holmes' words "to exact gifts that mankind does not possess," *International Harvester Company* v. *Kentucky,* 234 U.S. 216, 224. Even if the union and employer are in agreement regarding the costs which the employer shall bear, they may reasonably differ as to their economically soundest allocation. Similarly, they may well differ as to the costs of a promise to provide certain minimum benefits. These are issues affecting the ultimate security of the worker, and they involve substantial costs to the employer. If active employees know that collective bargaining cannot obtain improvements for them once they retire, the lengthy and disruptive strikes over judgments which by their nature must be largely speculative will be inevitable.

It should be noted further that the employer's agreement to pay pension benefits is only the first half of the matter. It is also essential that adequate monies to pay the monthly pension benefits be available as they come due. The traditional mechanism for financing pensions is the "pension fund," to which the employer makes periodic contributions. Because most collective bargained pensions plans give the employer considerable time to reach complete funding (the median period is approximately 30 years), it is almost invariably true that at the moment an employee retires the

employer will not have yet contributed the full amount necessary to pay his pension for the rest of his life. Normally the employer anticipates contributing to the fund on a regular basis to provide the monies to pay that pension. Periodic reviews of the financial health of the pension fund are therefore essential to assure that it will be adequate to provide pension payments as they come due. After such a review the union may conclude that an employer's rate of contribution is too slow, or the union may find that the investment of pension monies has resulted in losses. If these eventualities arise the union may, through bargaining, insist on requiring an additional contribution.

The fact that every contribution the employer makes goes into a single fund, from which benefits will be paid to eligible retirees, regardless of whether they were active or retired at the time the payments were made, is perhaps the most striking evidence of the artificiality of the view of bargaining adopted below. The size of the employer's contribution is his main stake in the amount of benefits and in establishing eligibility—it is, in a word, his cost. Yet until the time that the plan is completely funded, it is a logical impossibility to bargain about that contribution without bargaining about the interests of persons already retired. Only after funding is complete does every cent contributed go to provide payments to persons presently employed—and then only if the benefits of those already retired remain constant.

The sum of the matter, as the Board stated, is that:

> "Forced reliance on fixed, preretirement formulas has shortcomings which may lead to disappointing results in the operation of a plan. There may be a variety of changes in the experience of the covered group or in the operation or administration of the plan itself which the parties cannot foresee. The changing value of the dollar, rising medical costs, and other economic developments might alter the real level of benefits envisaged by the original formula. The parties may also reappraise their feelings as to the fair economic share owing to retired workers, just as society itself periodically reexamines its commitments to the elderly. In addition,

insurance and health care plans are constantly developing new features and refinements.

* * *

"With respect to new problems which arise under a health insurance plan for retired employees, collective bargaining is not only a suitable method for exploring digerent solutions, but it is probably the most rational and effective method. A plan which has its inception in the collaborative process of a labor-management agreement reflects the assumptions, arguments, and aspirations—as well as the compromises—of the parties to that process. While the process of collective bargaining does not guarantee that its agreements will be wise, the process does help to assure the acceptability of those agreements because they were reached through the participation and the commitment of the parties most affected. Moreover, to deny collective bargaining a role in the development of health benefits plans for retired employees might undermine their viability." (A. 40-41).

CONCLUSION

For the above stated reasons as well as those developed by the Union and the NLRB, the judgment of the court below should be reversed and the case should be remanded to that court with directions to enforce the Board's Order.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 910

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1, PETITIONER

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL.

No. 961

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (A. 183–200) is reported at 427 F. 2d 936. The decision and order of the National Labor Relations Board (A. 25–53, 9–24) are reported at 177 NLRB No. 114.

JURISDICTION

The judgment of the court of appeals (A. 201) was entered on June 10, 1970. The Board's timely petition for rehearing *en banc* was denied (Judges Edwards and McCree dissenting) on July 31, 1970 (A. 202). The Union's petition for a writ of certiorari was filed on October 27, 1970, and the Board's petition was filed on November 12, 1970.[1] The petitions were granted on February 22, 1971 (A. 203). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are set forth in the Appendix, *infra*, pp. 35–39.

QUESTION PRESENTED

Whether an employer violates Section 8(a) (5) and (1) of the National Labor Relations Act by refusing to bargain with the statutory barganing representative of his employees concerning mid-term changes in health benefits the employer proposes to negotiate with employees who have retired.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Since 1949, Local 1, Allied Chemical and Alkali Workers of America (the "Union") has been the exclusive bargaining representative for the employees working at hourly rates of pay in the Barberton, Ohio,

[1] On October 16, 1970, Mr. Justice Stewart extended the Board's time for filing a petition to and including November 16, 1970 (A. 202–203).

facilities of the Pittsburgh Plate Glass Company (A. 26; 4, 8, 110–113). In 1950, the Union and the Company negotiated a contract which included provisions for pensions and a medical insurance plan. At the same time the parties agreed orally that retired employees could participate in the medical plan by contributing the entire cost of the insurance premiums, which would be deducted from their pension benefits. (A. 26; 116–117, 150–151, 172.)

In 1959, during negotiations for a new contract, the parties orally agreed to an increase in the hospitalization benefits available to retired employees; this oral agreement was reduced to writing shortly thereafter (A. 11–12, 26; 108–109, 116–117, 134–135). In 1962, the Company agreed to contribute two dollars per month toward the cost of insurance premiums for employees who retired in the future and elected to participate in the medical plan (A. 12, 27; 56, 117–118, 133, 172).[2] The pension plan was also amended to make 65 the mandatory retirement age (A. 12, 27; 54–56, 118). When the contract was reopened for negotiation in 1964, the Company agreed to increase its monthly contribution to medical insurance from two to four dollars; the increase was available to each participating employee who had retired on or after the effective date of the 1962 contract (A. 12, 27; 120–121, 88). In anticipation of the enactment of Medicare, the

[2] The total cost of the hospital and surgical plan was $11.41 per month for the retiree and his spouse. In addition to paying $2.00 per month toward this cost, the Company agreed to provide future retirees with $2,000 life insurance coverage at no cost to the employee. (A. 56.)

1964 agreement also provided that the Company might rescind the two-dollar increase if a government health program were enacted (A. 88).

Congress enacted Medicare on July 30, 1965, effective July 1, 1966.[3] In November 1965, while the 1964 contract was still in effect, the Union asked the Company to engage in mid-term bargaining for the purpose of negotiating insurance benefits not available under Medicare. The Company did not respond until March 1966; it then stated that, because of the enactment of Medicare, it intended to rescind the two dollars per month increase for retired employees as of July 1, 1966. In addition, the Company stated that it intended to cancel the medical insurance plan for retired employees entirely, because in its opinion the enactment of Medicare made this insurance useless.[4] Instead, the Company stated it would pay the three-dollar per month subscription cost of supplemental Medicare coverage for each retired employee.[5] (A. 12–13, 27–28, 122–127, 134, 145, 155–161, 169, 179–180.)

The Union conceded that the Company had the right under the contract to reduce its monthly con-

[3] P.L. 89–97, 79 Stat. 291, 305, 42 U.S.C. 1395, *et seq.*

[4] The certificate of insurance stated that the plan would not duplicate payments made by other group employers under other insurance plans to which the Company made contributions. The Company considered the Medicare plan to be an insurance plan of another employer. (A. 169.)

[5] Hospital benefits under Medicare are received automatically by any social security annuitant 65 years of age or over. Medical benefits are optional and, at the time herein, required a payment of $3.00 per month for each person. (A. 93; 42 U.S.C. 1395c, 1395r.)

tribution per employee from four to two dollars, but protested the Company's proposal to cancel unilaterally the contract medical plan for retired employees. The Company challenged the Union's right to bargain for retired employees at all. In reply to the Union's questions about the effect of cancellation of the contract plan on pensioners and their wives who were under 65 and not yet eligible for Medicare, the Company stated that it would have to work out a program for their coverage. (A. 14, 28; 125–127, 134, 159–161, 179–180.)

Two days later the Company reconsidered and informed the Union that it would not cancel the medical plan for retired employees. Rather, it would write to each retired employee offering to pay the three dollars per month supplemental Medicare premium if he were to withdraw from the contract medical plan. The Union objected that any change in the negotiated plan was a bargainable matter, which the Company could not put into effect unilaterally. The Company sent the letters to its retired employees the following day. As a result, approximately 15 of 190 retired employees canceled their participation in the contract medical plan. The Union thereupon filed charges with the Board alleging that the Company's conduct constituted an unlawful refusal to bargain. (A. 14–15, 28; 92–101, 127–129, 145–146, 170–171, 174.)

B. THE DECISIONS OF THE BOARD AND THE COURT OF APPEALS

The Board (Member Zagoria dissenting) held that benefits for persons who have already retired consti-

tute a mandatory subject of collective bargaining and that thus the Company's unilateral action changing the benefits violated Section 8(a) (5) and (1) of the Act (A. 25–52).[6] The Board's conclusion rested on two bases: first, that a retiree remains an "employee" for purposes of the Act insofar as his retirement benefits are concerned (A. 30–38); and, second, that the subject of benefits for retired employees vitally affects the terms and conditions of employment of the active employees, and is thus a mandatory subject of bargaining as to them (A. 38–45). The Board also found that the Company's action was a mid-term modification of the existing agreement forbidden by Section 8(d), and hence violated Section 8(a) (5) and (1) for that reason as well (A. 45–46). The Board ordered the Company to cease and desist from the unfair labor practices found; to rescind upon the Union's request any unilaterally instituted adjustment in the health insurance plan for retired employees; and to post and mail appropriate notices (A. 47–48).

The court of appeals denied enforcement of the Board's order (A. 183–200). It held that persons who have already retired are not "employees" within the meaning of Section 8(a)(5), and that improved benefits for retired employees do not vitally affect the terms and conditions of employment of active em-

[6] Accord: *Westinghouse Electric Corp.*, 188 NLRB No. 126 (Chairman Miller dissenting in relevant part); *Union Carbide Corp.*, 187 NLRB No. 10; *Union Carbide Corp.-Linde Div.*, 189 NLRB No. 28. See also *Hooker Chemical Corp.*, 186 NLRB No. 49.

ployees. With respect to the latter issue, the court held that the interests of active employees are sufficiently protected by their right to bargain collectively about their prospective retirement benefits while they are currently employed, and to invoke the contractual grievance procedure or sue under Section 301 of the Labor Management Relations Act (29 U.S.C. 185) for any breach of contract affecting their benefits after retirement (A. 198, 191, n. 9).

SUMMARY OF ARGUMENT

Employers and unions are obligated to bargain collectively about pensions and insurance benefits to be enjoyed by active employees after their retirement. Indeed, a large percentage of union-represented employees are currently working under negotiated pension and health and welfare plans. The Board properly concluded that the Act's mandatory bargaining requirement also imposes a duty on the employer (and the union) to bargain concerning changes in the health benefits which are paid to employees who have already retired.

I

The statutory obligation to bargain, though normally concerned primarily with the working conditions of the employees in the unit represented by the union, also encompasses matters involving individuals outside the unit which have a direct bearing on employees within the unit. See *Local 24, Teamsters* v. *Oliver,* 358 U.S. 283, explained in *United States* v. *Drum,* 368 U.S. 370, 382, n. 26. The interest of the

active members in the health benefits accruing to retirees is sufficiently substantial that the obligation to bargain with respect to "terms and conditions of employment" set forth in Sections 8(a)(5) and 8(d) of the Act embraces these benefits without regard to whether retirees remain "employees" within the meaning of the Act. In short, the benefits accruing to retirees directly affect the "terms and conditions of employment" of the active employees.

Active employees, to insure that their own needs will be met during their retirement years notwithstanding post-retirement inflation or legislative change, may forego certain immediate benefits in order to protect or increase payments to retired employees. Similarly, the prospect that in the event of such changes the bargaining representative may bargain for an upward adjustment of retirees' benefits, may make active employees more willing to reach agreement on the present level of their projected retirement benefits and on such related matters as the mandatory age of retirement. The interests of active and retired employees likewise intertwine in other ways—*e.g.*, where they are included under a single health insurance contract.

The considerations relied on by the court below do not warrant the creation of an artificial barrier between the two classes. Although the union can negotiate a retirement plan for active employees alone and obtain judicial relief for its breach, bargaining is more meaningful, and the possibility of reaching an agreement is enhanced, if the union is able to nego-

tiate also for the retirees. Moreover, employers normally regard retirees' benefits as part of their labor cost, so that these benefits have a direct effect on the benefits for active employees. There is no basis for the court's assumption that the union, if it bargains for retirees, would normally sacrifice their interests in favor of those of the actively employed. Neither the bargaining representative nor the active employees can help but recognize that the active employees of today are the retirees of tomorrow. While conflicts may arise between the two groups, the good faith resolution of such conflicting interests is a normal and necessary part of the bargaining representative's performance of its statutory functions. There is no reason to assume that the retirees—who lack the expertise of the union and the employer in dealing with such a technical subject as health benefits—would fare worse when represented by the union which originally negotiated those benefits than they would if required to negotiate individually with the employer.

II

In any event, retirees' benefits are mandatory subjects of collective bargaining because retirees are "employees" within the meaning of Sections 8(a)(5) and 9(a) of the National Labor Relations Act with respect to their retirement benefits. This conclusion is merely another application of the principle that, in order to carry out the statutory policies, the Act should be broadly construed to include individuals at both ends of the employment spectrum—those who

have arguably not yet become "employees" as well as those whose employee status has allegedly been terminated. Although retirees are ineligible to vote in Board-conducted elections, this is because they do not share a sufficient community of interest with active employees respecting such matters as *current* wages, hours, and working conditions. The Board reasonably concluded that different considerations apply here, since the benefits paid to retirees are part of the return on their investment of a lifetime of active employment.

The conclusion that retired employees are "employees" for purposes of Section 8(a)(5) of the National Labor Relations Act is consistent with the interpretation given Section 302(c)(5) of the Labor Management Relations Act, which provision should be harmonized with Section 8(a)(5). While Section 302 prohibits employer payments to representatives of employees, paragraph (c)(5) exempts payments to "a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer." The courts of appeals have held that the term "employees of such employer"—which is similar to the term "his employees" in Section 8(a)(5)—includes both current and retired employees.

III

The Board's conclusion that the statutory bargaining obligation extends to health benefits for employees who have already retired is consistent with industrial practice. Accordingly, the Board's view "would promote the fundamental purpose of the Act by bringing

a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace." *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203, 211. The contrary conclusion of the court below undercuts the current industrial practice of subjecting these matters to "the mediatory influence of negotiation" (*ibid.*), and is contrary to the salutary trend accommodating the scope of mandatory bargaining to the changing needs and interests of the parties.

ARGUMENT

INTRODUCTION

Sections 8(a)(5) and 8(d) of the National Labor Relations Act "establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment' * * *:" *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203, 210. "The term 'bargain collectively' as used in the Act 'has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States.'" *National Labor Relations Board* v. *American National Insurance Co.,* 343 U.S. 395, 408, quoting *Telegraphers* v. *Railway Express Agency,* 321 U.S. 342, 346. "Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process." *Fibreboard, supra,* 379 U.S. at 211.

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Employers and unions are obligated by Section 8(a)(5) and 8(d) of the Act to bargain collectively about pensions and insurance benefits to be enjoyed by active employees after their retirement. *Inland Steel Co.*, 77 NLRB 1, enforced, 170 F. 2d 247 (C.A. 7), certiorari denied on this issue, 336 U.S. 960; see *W. W. Cross & Co.*, 77 NLRB 1162, enforced, 174 F. 2d 875 (C.A. 1). Indeed, a large percentage of union-represented employees are currently working under negotiated pension and health and welfare plans.[7] The question presented here is whether the Board properly concluded that the Act's mandatory bargaining requirement also imposes a duty on the employer (and the union) to bargain concerning changes in the benefits which are paid to employees who have already retired. We contend in Point I below that, without regard to whether retirees remain "employees" within the meaning of the Act, the statutory bargaining obligation embraces the health benefits received by them because such benefits directly affect the "terms and conditions of employment" of

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[7] Social Security Programs in the United States, U.S. Dept. of Health, Education, and Welfare, Social Security Administration (1968), p. 16; Preamble to the Welfare and Pension Plans Disclosure Act, 1958, Sec. 2(a), 72 Stat. 997, 29 U.S.C. 301(a), cited by the Board (A. 30, n. 9).

"By the end of 1966 * * * 14 million [workers in private industry] were covered by negotiated retirement plans. * * * Of the estimated 17.8 million non-government workers under union contracts in 1966, * * * 3 out of 4 [had] retirement plan coverage." Kittner, *Negotiated Health and Retirement Plan Coverage*, 91 Monthly Labor Review (December 1968), p. 24.

the active bargaining unit employees. We further contend in Point II that there is a duty to bargain about such benefits because the retirees do, in fact, remain "employees" within the meaning of the Act insofar as their retirement benefits are concerned. Finally, we urge in Point III that the Board's conclusion that the Act's bargaining obligation encompasses the benefits paid to retirees accords with the practice of collective bargaining and effectuates the policies of the Act.

I

THE NATIONAL LABOR RELATIONS ACT IMPOSES A DUTY TO BARGAIN ABOUT THE HEALTH BENEFITS PAID TO RETIREES BECAUSE THESE BENEFITS DIRECTLY AFFECT THE TERMS AND CONDITIONS OF EMPLOYMENT OF THE ACTIVE EMPLOYEES

The statutory obligation to bargain, though normally concerned primarily with the working conditions of the employees in a particular bargaining unit, also encompasses matters involving individuals outside the unit which have a direct bearing on employees within the unit. See *Local 24, Teamsters* v. *Oliver,* 358 U.S. 283, 362 U.S. 605. As the Court explained in *United States* v. *Drum,* 368 U.S. 370, 382, n. 26, *Oliver* held that the union which represented a bargaining unit including an "overwhelming majority of concededly employed drivers of carrier-owned equipment" was entitled to bargain with the carrier over the minimum rental to be paid owner-drivers of transport vehicles to whom the carrier had subcontracted part of his operation; in reaching this conclusion, it was unnecessary "to determine whether the owner-drivers

were 'employees' protected by the Act, since the establishment of the minimum rental to them was integral to the establishment of a stable wage structure for clearly covered employee-drivers." Similarly, health benefits for the dependents of active employees obviously are mandatory subjects of bargaining, even though the dependents are not themselves employees.[8] Changes in the benefits paid to retirees similarly are a mandatory bargaining subject because they directly affect the terms and conditions of employment of the active employees.

As the Board here noted (A. 38), for "employers, the promise of retirement benefits aids in obtaining good workers, retaining them, and easing their acceptance of retirement."[9] For "active employees, provisions for pension and health benefits after retirement are an integral part of their total compensation" (*ibid.*). See *Inland Steel Co.* v. *National Labor Relations Board, supra,* 170 F. 2d at 253. The actual value of those future benefits to the employee when he becomes entitled to them, however, depends upon many factors which the bargaining parties cannot anticipate

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[8] See also *Curtiss-Wright Corp.* v. *National Labor Relations Board*, 347 F. 2d 61, 70–71 (C.A. 3) (employer required to divulge information with respect to administrative employees, not in the bargaining unit, because "such information was shown to be relevant to the determination of the status of employees as unit employees").

[9] Cf. *Bedford* v. *White*, 106 Colo. 439, 106 P. 2d 469 (statute providing pensions for judges who retired before its enactment serves a public purpose; for such benefits, no less than those paid to judges retiring after enactment, would tend to encourage "an able man with economic doubts" to overcome them and enter "the judicial service," 106 P. 2d at 477).

and over which they have no control. Monetary inflation is one such factor;[10] public law is another. Indeed, the instant case arose because new legislation, Medicare, had unsettled the retirement benefits to which the parties had previously agreed.

Accordingly, active employees, to insure that their own needs will be met when they retire, may forego certain immediate benefits in order to protect or increase payments to retired employees.[11] Indeed, active

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[10] As students of the subject have stated: "A pension plan which cannot be viewed with pride, and under which employees resist retirement, can be worse than no plan. There is not much point in maintaining a poor plan. Consequently, frequent revision during a period of rapidly rising money wages has been regarded as inevitable. * * * [G]ranted that inflation is taking place, there is not much argument that pensions have to keep pace." Slichter, Healy, and Livernash, *The Impact of Collective Bargaining on Management* (Brookings, 1960), p. 395.

[11] Thus, in mid-1956, the Textile Workers Union and the American Viscose Co. increased retirement benefits and provided for the employer's assumption of the full cost of the pension effective June 1, 1956, while postponing a wage increase to July 1957. Skolnick and Zisman, *Growth in Employee-Benefit Plans*, reprinted from the Social Security Bulletin, U.S. Dept. of Health, Education, and Welfare, Social Security Adm'n (March, 1958), p. 12.

As Archibald Cox pointed out in rejecting the contention, in an arbitration proceeding, that the union had violated its fiduciary duty by pressing for larger payments for pensioners instead of concentrating its full bargaining power in support of demands directly benefiting the active employees: "* * * The union representatives and the current work force may well have been looking to the future. Each contract they are able to negotiate upon the principle that the liberalization of pensions should extend to employees who have already retired may help to establish an accepted practice upon which the current employees may benefit after their retirement. Similarly, the union officers and members might believe that it would

employees are certain to be aware, as the Board observed (A. 35), that "[i]n some respects, an employee's retirement from active employment and his separation from the daily association with fellow workers is the very time when he is most vulnerable economically and most needs representation. This is the point at which his economic alternatives are most limited because of his age." Similarly, as the Board noted (A. 39), the prospect that the collective bargaining representative may bargain for an upward adjustment of retired employees' benefits to accommodate unanticipated economic and social changes may make active employees more willing to reach agreement on the present level of their projected retirement benefits and on such related matters as the mandatory age of retirement, which was fixed at 65 by the contractual pension provisions in the present case. Absent such assurance of future representation, the active employees may insist on leaving the level of benefits or the retirement age more flexible, and this, in turn, would make it more difficult to reach an agreement with the employer.

Moreover, active and retired employees are often grouped under a single health insurance contract, as was the case here. In such a combined plan, it is the size and experience of the entire group which determines the rates and benefits. The withdrawal of retired employees from contract coverage is likely to

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solidify and strengthen their organization to provide for the welfare of retired workers who had long held jobs that became part of the bargaining unit." *United Drill & Tool Corp.*, 28 LA 677, 685 (1957).

change the insurance rate for active employees. On the one hand, diminishing the size of the group would tend to increase the rates (A. 39); on the other hand, the withdrawal of the older people, whose medical expenses generally are higher, could reduce rates. But whatever the effect, it is one that the employer and the union would be concerned about in collective bargaining because of its impact upon active employees.

A similar interrelation between active employees and retirees exists, for example, in the funding of pension plans. Thus, since most such plans give the employer many years to reach complete funding, it is generally true that, at the moment an employee retires, the employer will not yet have contributed the full amount necessary to pay his pension for the rest of his life. Periodic review of the financial condition of the pension fund is therefore essential to assure that it will be adequate to provide pension payments as they come due. If, after such review, the union finds that an employer's rate of contribution is too slow or that the investment of pension monies has resulted in a loss, it may, through bargaining, attempt to obtain an additional employer contribution. In determining how much additional employer contribution is needed, the union must necessarily take into account not only the level of benefits being paid to retirees, but also the amounts which will have to be paid to the active employees who are on the verge of retirement; otherwise, the payments to the retirees will depreciate the active employees' share of the fund. See Brief for the AFL–CIO and the United Auto-

mobile Workers, as *Amicus Curiae,* filed in support of the petition in No. 961, pp. 9–10.

For these reasons, the Board properly concluded (A. 38, 40) that the health benefits paid to retired employees have a direct bearing on the wages, hours, and working conditions of the active employees, and that the movement from active employment to retirement is a natural continuum in which the interests of the actively employed become more and more like those of the retirees as their length of service increases. The court below, rejecting the Board's view, has created an artificial barrier between the two classes. The considerations relied on by the court do not warrant that separation.

1. The court noted (A. 198) that the union can negotiate a retirement plan for active employees alone, and that retirees can protect themselves against violations of that plan by bringing a breach of contract suit under Section 301 of the Labor Management Relations Act (29 U.S.C. 185). But in view of the interrelation between the benefits paid to retirees and the wages and other working conditions of active employees, discussed above, bargaining is more meaningful, and the possibility of reaching an agreement is enhanced, if the union is able to negotiate not only for the active employees but also for the retirees. Active employees, for example, are considerably more likely to place their confidence in an agreement with respect to whose terms the union will continue to represent them than in provisions for whose breach only the Section 301 remedy will be available. Moreover, the

basic assumption of the National Labor Relations Act is that such disputes ordinarily are better settled through collective bargaining than through litigation.

2. Nor is it material that "all employer expenditures, from dividends to capital expenditures, affect, however obliquely, the availability of employer funds for active unit employees" (A. 198). Employers normally regard retirees' benefits as part of their labor cost, so that these costs have a direct, and not merely an oblique, effect on the benefits for active employees. Thus, the retiree health insurance benefits here were originally bargained for as a single labor cost package, and both active employees and retirees were grouped under a single health insurance contract (*supra*, pp. 3–4).

3. Finally, there is no basis for the court's assumption (A. 200) that the union, if given the right to bargain for retirees, would normally seek to sacrifice their interests in favor of those of the actively employed. The court noted that the retirees here are "honorary union members, who retain no voting power" (*ibid.*).[12] Neither the bargaining representative nor the active employees, however, can help but recognize that the active employees of today are the retirees of tomorrow—indeed, such a realization undoubtedly underlies the widespread industrial practice of bargaining about benefits of those who have already retired (*infra*, pp. 27–29), and explains the vigor-

[12] Retirees do not vote in Board elections (see *infra*, pp. 24–25). And, under the rules of the Union, they may attend union meetings but are not eligible to vote on ratification of the contract negotiated by the Union (A. 140).

ous interest which the Union has taken in this case. While conflicts may arise between the two groups, the good faith resolution of such conflicting interests is a normal and necessary part of the bargaining representative's performance of its statutory functions. See *Vaca* v. *Sipes,* 386 U.S. 171, 177–178; *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 180–181.

The union owes a duty of fair representation to all the employees for whom it is the exclusive bargaining representative, irrespective of whether they are members of the union, and this duty extends beyond the employees immediately in the unit. See *Bro. of Railroad Trainmen* v. *Howard,* 343 U.S. 768; *Dillard* v. *Chesapeake & Ohio Ry Co.,* 199 F. 2d 948 (C.A. 4); *Houston Maritime Assoc.,* 168 NLRB 615, 617, 625–626, enforcement denied on other grounds, 426 F. 2d 584 (C.A. 5).

The Union represented the retirees here in several important respects, and there is no showing that such representation was unfair or inadequate.[13] Indeed, it is contrary to reason to assume that the retirees—who lack the experience of the union and the employer in dealing with such a technical subject—would fare worse with respect to changes in retirement benefits when represented by the union which originally negotiated those benefits than they would if they were required to bargain individually with the employer.

[13] The Company's pension agreement permits the Union to pursue through appeal stages and into arbitration any differences between the Company and a retiree concerning his age, years of service, the cause of his disability, and other related matters (A. 81–82).

The Company contends (Opposition to Pet. in No. 961, pp. 13–14) that the Board's position would lead to the breakdown of the unit bargaining principle on which the Act is premised, with the result that "[a] bargaining representative, once certified for a particular unit, could then demand bargaining for excluded classes of employees in the same plant or even other plants * * * operated by the same or even another employer." The retirees, however, are not strangers to the unit. They were formerly active employees and as such were full-fledged members of the unit; upon retirement they receive benefits negotiated for them by the Union that represented them while they were active members of that unit.[14] Moreover, as shown, the benefits received by retirees have a direct impact on the terms and conditions of employment of the active employees in the unit. Accordingly, to require bargaining with respect to changes in the benefits received by retirees does not in any real sense ignore unit lines or create an unreasonable enlargement of the bargaining obligation.

II

IN ADDITION, RETIREES REMAIN THE EMPLOYER'S "EMPLOYEES" WITHIN THE MEANING OF SECTION 8(a)(5) OF THE ACT WITH RESPECT TO THEIR RETIREMENT BENEFITS

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain collec-

[14] Contrary to the view of the court below (A. 195), the receipt by retirees of retirement benefits, rather than emphasizing "the finality of their employment severance," shows that they still have a continuing tie with the unit.

tively with the representative of "his employees, subject to the provisions of section 9(a)." Section 9(a), in turn, provides that the representative selected for collective bargaining purposes by a majority of the employees in an appropriate unit shall be the exclusive representative "of all the employees in such unit * * *." The Board found (A. 38), in the alternative, that "retired employees are 'employees'" within the meaning of these provisions and thus that "changes in benefits which are rooted in their years of active employment are encompassed within the bargaining obligations of the Act." [15] This conclusion is supported by established principles and past precedents.

The National Labor Relations Act must be interpreted not technically or narrowly, but so as best to effectuate its purposes. See *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111, 129; *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 185–186. "[I]nsights derived from syntactical analyss form a hazardous basis for the explication of major legislative enactments." *Machinists Local* v. *National Labor Relations Board,* 362 U.S. 411, 417, n. 7. To carry out the policies of the Act, the statutory protections have been broadly construed to include individuals at both ends of the employment spectrum—those who have arguably not yet become "employees" as well as those whose active

[15] This quotation from the Board's decision shows that the court below erred in asserting that "the Board made no finding in this case that retirees are employees within the meaning of the Act" (A. 195, n. 14).

employee status has allegedly ended.[16] The Board's conclusion that with respect to retirement benefits retirees are "employees" for purposes of the Act's bargaining provisions is merely another application of this principle.[17]

The court below departed from the underlying policy of the Act in holding that only employees presently on the payroll could be viewed as the employer's em-

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[16] *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177 (refusal to hire job applicants unlawful discrimination within the meaning of Section 8(a)(3); backpay and offer of employment an appropriate remedy even though applicants had obtained regular and substantially equivalent employment elsewhere after the discriminatory refusal to hire); *Houston Chapter, Associated General Contractors*, 143 NLRB 409, 411–413, enforced, 349 F. 2d 449 (C.A. 5), certiorari denied, 382 U.S. 1026 (nondiscriminatory union hiring hall a mandatory subject of bargaining, and applicants for employment thereunder are "employees" within the meaning of the Act); *National Labor Relations Board* v. *Local 542, Int'l Union of Operating Engineers*, 331 F. 2d 99, 106–107 (C.A. 3), certiorari denied, 379 U.S. 889 (proscription in Section 8(b)(7) of the Act against picketing to force employer "to recognize or bargain with a labor organization as the representative of *his* employees" (emphasis added) includes recognitional picketing respecting prospective as well as current employees); *Laidlaw Corp.* v. *National Labor Relations Board*, 414 F. 2d 99 (C.A. 7), certiorari denied, 397 U.S. 920 (replaced economic strikers retain their employee status at least to the extent of being entitled to preference for job vacancies that subsequently develop); *Chemrock Corp.*, 151 NLRB 1074 (union entitled to bargain with successor employer, as representative of "his employees" within the meaning of Section 8(a)(5), respecting proposed conditions of employment of truckdrivers employed by predecessor, whom successor refused to hire at their previous rate of pay).

[17] See generally Note, *Retirees in the Collective Bargaining Process: A Critical Review of Pittsburgh Plate Glass Co.* v. *NLRB*, 23 Stan. L. Rev. 519 (1971).

ployees in the bargaining unit. The court reasoned that: "Upon retirement, employees are completely removed from the payroll and seniority lists, and thereafter they perform no services * * *, are paid no wages, are under no restrictions as to other employment or activities, and have no rights or expectations of re-employment. For these reasons, * * * the Board has consistently held that retired employees have no right to vote in representation elections * * *." (A. 195.) The Board, however, correctly concluded:

> Compensation for employment need not be synchronous with the performance of labor. Current services may be rewarded by benefits which arise (or continue) in the future, and past services may be retroactively compensated with additional benefits. * * * The health insurance plan here was negotiated for active employees to be enjoyed upon retirement, and its terms relate back to their active employment. For retired employees, the benefits paid to them in retirement are part of the return on their investment of a lifetime of labor. * * * It would virtually stand the Act on its head to hold that [the retiree's] employer is free to deal with him unilaterally and that the union may not represent him with respect to changes in the very plan which it negotiated for him. [A. 35.]

Board rulings that retired employees are ineligible to participate in Board-conducted elections do not rest, as the court below suggests (A. 195, 196–197), on a determination that retirees are not employees within the meaning of the Act. Rather, they depend on the Board's judgment that retired employees do not share a

sufficient community of interest with active employees respecting such matters as current wages, hours, and working conditions to warrant their participation in the selection of a bargaining representative. As the Board noted, the eligibility of employees to vote in representation elections is not dispositive, in this or other contexts, of their right to be represented in collective negotiations as members of the bargaining unit. Thus, there are inactive employees who remain eligible to vote (*e.g.*, those on military leave or layoff), and active employees who are not eligible (*e.g.*, those hired after the election eligibility date). (A. 32–33.) Cf. *National Labor Relations Board* v. *Hondo Drilling Co.*, 428 F. 2d 943, 945–946 (C.A. 5) (Board properly extended "voting rights not only to those employees actually on the payroll, but also to employees who could reasonably anticipate future employment with the company").[18]

Furthermore, as the Board pointed out (A. 37–38), the conclusion that retired employees are "employees" for purposes of Section 8(a)(5) of the National Labor Relations Act is also consistent with the interpretation given to Section 302(c)(5) of the Labor Man-

[18] The court below relied upon two Board decisions that the agency has overruled: *Taunton Supply Corp.*, 137 NLRB 221, 223 (part-time workers who are social security annuitants excluded from unit), overruled in *Holiday Inns of Oak Ridge*, 176 NLRB No. 124, enforced, 77 LRRM 2128 (C.A. 6), in reliance on *Indianapolis Glove Co.* v. *National Labor Relations Board*, 400 F. 2d 363 (C.A. 6); and *Denver-Colorado Springs-Pueblo Motor Way*, 129 NLRB 1184 (dual-function employee must perform unit tasks more than 50 percent of his time to be included in the unit), overruled in *Berea Publishing Co.*, 140 NLRB 516, 519.

agement Relations Act, 29 U.S.C. 186.[19] Section 302 of the LMRA, which prohibits employer payments to representatives of employees, exempts payments to "a trust fund established by such representative for the sole and exclusive benefit of the employees of such employer" (Section 302(c)(5)). Both the Eighth and the Ninth Circuits have held that the term "employees of such employer" in Section 302(c)(5)—which is similar to the term "his employees" in Section 8(a)(5)—includes both "current employees and persons who were covered current employees but are now retired." *Blassie* v. *Kroger Co.*, 345 F. 2d 58, 70 (C.A. 8); accord: *Local No. 688, Int'l Bro. of Teamsters* v. *Townsend*, 345 F. 2d 77 (C.A. 8), and *Garvison* v. *Jensen*, 355 F. 2d 487 (C.A. 9).[20] Since retirees are employees under Section 302(c)(5), to refuse to regard them as employees for Section 8(a)(5) purposes as well would lead to this anomaly: the union would be entitled to represent retired employees in administering a trust plan, but would not be entitled to represent them under Section 8(a)(5) in negotiating amendments to

[19] The provisions of the NLRA are in Title I of the LMRA. Titles I and III are to be construed as a single harmonious entity. *Boys Markets, Inc.*, v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 242–249; *Int'l Bro. of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 700–701.

[20] As the court stated in *Blassie*, *supra*, 345 F. 2d at 69: "e. Any plan for the health and economic well-being of employees, whether it be one gratuitously granted or one hammered out by hard bargaining, would normally be expected to embrace the crises of unemployment, retirement, and disability, as well as those of the better times of active employment. * * * The trend of welfare plans toward the inclusion of retired persons is a fact of today's industrial life which needs no documentation here."

the plan (A. 37). Moreover, this anomalous distinction itself would frequently interject into welfare plan negotiations the troublesome threshold question whether particular proposals involved the administration of the written agreement, in which case the union would be entitled to represent retired employees, or its renegotiation, in which case, under the theory of the court below, it would not.[21]

III

THE BOARD'S HOLDING ACCORDS WITH THE PRACTICE OF COLLECTIVE BARGAINING AND EFFECTUATES THE POLICIES OF THE ACT

The Board's conclusion that the bargaining obligation imposed by the National Labor Relations Act extends to health benefits for employees who have already retired is consistent with industrial practice. As the Board pointed out, "[m]any unions and employers now bargain about pension and health benefits

[21] Nor is the propriety of harmonizing Section 8(a)(5) with Section 302(c) diminished by the rationalization of the court below (A. 194) that "[n]ot to regard retirees as employees for the purposes of that section [302(c)] would frustrate the purpose of retirement trusts, which have been designated as mandatory subjects of bargaining, by making distributions to retirees from them illegal." The issue is not whether retirees properly are treated as employees under Section 302(c)(5), but whether it would be anomalous, in view of such treatment, not to view them as employees for collective bargaining purposes.

As the Board further noted (A. 37, n. 25), to hold that retirees are employees for purposes of the National Labor Relations Act, is also consistent with the Internal Revenue Service's view that a benefit plan "is for the exclusive benefit of employees or their beneficiaries [within the meaning of the Revenue Code of 1954, 26 U.S.C. 401] even though it may cover former as well as present employees * * *." Cf. *Blassie* v. *Kroger Co.*, *supra*, 345 F. 2d at 70.

for retired employees, reflecting a 'wide-spread understanding of the law shared in industrial circles and among members of the labor relations bar' " (A. 31, quoting from *United Drill & Tool Corp.*, 28 LA 677, 685, discussed n. 11, *supra.*)[22] Similarly, the brief filed with this Court by the AFL–CIO and the United Automobile Workers lists 20 major contracts (*i.e.*, those covering between 600 and 35,000 employees) executed in 1969 or 1970, which effected changes in benefits to persons already retired. Brief *Amici Curiae* filed in support of the petition in No. 961, pp. 4–5, 17–22. Indeed, in the recent negotiations just concluded with General Motors, "the UAW secured the following major benefits for retirees: (1) an increase of $1 a month per year of service; (2) a plan pursuant to which prescriptions would be filled at a maximum charge of $1 to $2 per prescription; [and] (3) an agreement pursuant to which G.M. would pay Medicare premiums in their entirety." *Id.* at p. 5. Similarly, the United Steelworkers told the court below (*id.* at p. 6):

> In the steel and iron ore industries, improved pension and/or insurance benefits for employees retired resulted from collective bargaining in 1954, 1956, 1960, 1965 and 1968; in the aluminum industry, improvements for those al-

[22] See also S. Rep. No. 404, Part I, 89th Cong., 1st Sess., 23–24, which notes that the Health Insurance for the Aged Act, establishing Medicare, is made applicable both to employees already receiving social security benefits and to future retirees, in accordance with "the same practices * * * often followed under private pension plans; namely, to extend benefit liberalizations to existing pensioners on the rolls when doing so for future pensioners" (see A. 32, n. 13).

> ready retired were gained in 1949, 1956, 1960, 1962, 1965, and 1968; and in the can industry, in 1955, 1959, 1962, 1965 and 1968 * * *.

Thus, the Board's holding that adjustments in retirees' benefits are a mandatory subject of collective bargaining "would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace." *Fibreboard Paper Products Corp.* v. *National Labor Relations Board, supra,* 379 U.S. at 211. The contrary conclusion of the court below undercuts the current industrial practice of subjecting these matters to "the mediatory influence of negotiation" (*ibid.*), and is contrary to the salutary trend accommodating the scope of mandatory bargaining to the changing needs and interests of the parties. *East Bay Union of Machinists Local 1304* v. *National Labor Relations Board,* 322 F. 2d 411, 414 (C.A.D.C.), affirmed *sub nom. Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203; *Inland Steel Co.* v. *National Labor Relations Board,* 170 F. 2d 247, 254 (C.A. 7), certiorari denied, 336 U.S. 960; *Richfield Oil Corp.* v. *National Labor Relations Board,* 231 F. 2d 717, 723–724 (C.A.D.C.), certiorari denied, 351 U.S. 909.

The facts of this case underscore the appropriateness of resolving disputes over retiree benefits through the processes of collective bargaining. The problem here arose because new legislation, Medicare, unsettled the retirement benefits to which the parties had previously agreed. The Company initially took the

position that the enactment of Medicare rendered the negotiated health insurance plan useless for retirees, and announced that it had decided to make contributions toward their supplemental Medicare coverage instead (*supra,* p. 4). The Company changed its view when the Union pointed out that some pensioners and their wives were not old enough for Medicare coverage (*supra,* p. 5).[23] The Company thereupon decided upon a different accommodation between the negotiated plan and Medicare—namely, giving each individual a choice between the negotiated plan and Company contributions to supplement Medicare coverage—and refused to discuss the issue further with the Union (*supra,* p. 5). If the Company had bargained with the Union—which had already pointed out a major flaw in the Company's initial proposal—the parties might well have reached a different accommodation which was better adjusted to the retirees' needs without being more costly. The likely existence of viable alternatives which, because of the Company's refusal to bargain, were not considered here, is shown by the variety of accommodations which have resulted from collective bargaining by other employers and unions who have been confronted

[23] Indeed, there was a substantial question as to the correctness of the Company's threshold assumption that the nonduplication-of-benefits provision in its negotiated insurance plan was applicable to a government plan such as Medicare (A. 28–29, n. 5; *supra*, p. 4, n. 4).

with similar problems as a result of Medicare.[24] Accordingly, the Board correctly concluded (A. 41):

> With respect to new problems which arise under a health insurance plan for retired employees, collective bargaining is not only a suitable method for exploring different solutions, but it is probably the most rational and effective method. A plan which has its inception in the collaborative process of a labor-management agreement reflects the assumptions, arguments, and aspirations—as well as the compromises—of the parties to that process. While the process of collective bargaining does not guarantee that its agreements will be wise, the process does help to assure the acceptability of those agreements because they were reached through the participation and the commitment of the parties most affected. Moreover, to deny collective bargaining a role in the development of health benefits plans for retired employees might undermine their viability. These private plans provide an important supplement to gov-

[24] The changes adopted have seldom reduced the retirees' total protection (private plans plus Medicare), but, rather, have usually resulted in greater protection. Among the accommodations reached were: retaining the same benefits as for active workers under 65 but reducing them by Medicare benefits; providing benefits different from those provided active workers under 65, reduced in one respect or more by Medicare benefits; supplementing specific Medicare benefits or covering certain services not supplied under Medicare; or combining the several methods. Indeed, many health and insurance plans not only reimburse retirees and their spouses for the cost of part B (optional) Medicare coverage—the option to the existing plan which the Company offered to the retirees here—but also provide health benefits supplemental to Medicare. See Foust, *Effect of Medicare on Privately Bargained Plans*, 19

> ernmental social welfare programs, and an effective method of dispute settlement will contribute to their purposefulness.
>
> * * * * *

For these reasons, the Board was reasonable in holding that the benefits paid to retirees are within the area of mandatory bargaining under the Act and, therefore, that the Company violated Section 8(a)(5) and (1) by refusing to bargain with the Union respecting changes in those benefits. Accordingly, its decision is entitled to stand. "Obviously, classification of bargaining subjects as 'terms or conditions of employment' is a matter concerning which the Board has special expertise." *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 685–686. See also *Local No. 207, Int'l. Assoc. of Bridge Workers* v. *Perko*, 373 U.S. 701, 706. Its determination in this area "is to be accepted [by the reviewing court] if it has 'warrant in the record' and a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 131.[25]

New York University Conference on Labor (1966), pp. 273–278; Louchheim, *Impact of Medicare and Medicaid in Future Aspects of Benefit Plan Bargaining* (Rutgers, 1967), pp. vii–viii, 10–16; Beier, *Adapting Group Health Insurance to Medicare*, 89 Monthly Labor Review (May 1966), pp. 491–495; Kittner, *Negotiated Health Benefits and Medicare*, 91 Monthly Labor Review (September 1968), pp. 29–34.

[25] Moreover, having agreed with the Union on a contract embodying certain benefits for retired employees, the Company was not free to modify the contract at mid-term, either unilaterally or as the result of bargaining with the individual retirees, without following the procedures set forth in Section 8(d) of the Act, 29 U.S.C. 158(d). *National Labor Relations Board* v. *Huttig Sash & Door Co.*, 377 F. 2d 964, 967–968 (C.A. 8);

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to enforce the Board's order.

Respectfully submitted.

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MAY 1971.

National Labor Relations Board v. *Scam Instrument Corp.*, 394 F. 2d 884, 887 (C.A. 7), certiorari denied, 393 U.S. 980. See also *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 743; *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 338–339; *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678. Failure to follow these procedures, as the Board held (*supra*, p. 6), independently establishes a violation of Section 8(a)(5).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be af-

fected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can

be reopened under the provisions of the contract.

* * * * *

SEC. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

Relevant provisions of Title III of the Labor Management Relations Act, 29 U.S.C. 186, are as follows:

SECTION 302(c). The provisions of this section shall not be applicable

* * * * *

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, familes, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, to-

gether with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training program: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.[1]

[1] Section 302(c)(6) was added by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 537, 539, to remove doubts theretofore existing as to apprenticeship and training programs and as to vacation, holiday, severance or similar benefits. H. Rep. No. 741, 86th Cong. 1st Sess., pp. 46–47, II Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, Washington, 1959, pp. 804–805.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. ~~310 and 361~~

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION No. 1, *Petitioner*,

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL., *Respondents*.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF RESPONDENT PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 910 and 961

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1, *Petitioner,*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL., *Respondents.*

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF RESPONDENT PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION

With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief as *amicus curiae* in support of the Respondent, Pittsburgh Plate Glass Company, Chemical Division.

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers is a nonprofit voluntary business organization composed of manufacturing concerns, including corporations, partnerships, sole proprietorships, and other forms of business enterprises located throughout the United States and its territories. Most of its members engage in interstate commerce and are therefore subject to the provisions of the National Labor Relations Act.

This case involves certain aspects of the broad question whether an employer is required to bargain with former employees, or with a union claiming to represent such former employees, in regard to pensions, insurance or other matters.

A decision requiring such bargaining would go far beyond the present law and would open up a vast new area of collective bargaining on new subjects with a large new class of persons who have not heretofore been regarded as employees entitled to bargain under the National Labor Relations Act. Accordingly, the case could substantially affect the industrial relations of employers generally, including the members of this Association.

Moreover, a decision requiring such bargaining would compel employers to bargain in regard to reopening and changing the terms of previous collective bargaining agreements that have long since been performed and have expired, and renegotiating the wages, deferred compensation, and other benefits specified therein. This case, therefore, could have a major economic impact and possibly serious consequences with respect to costs, prices, and other financial aspects of the operations of employers generally, including the members of this Association.

Accordingly, the Association has an interest in the proper resolution of the issues before the Court in this case.

SUMMARY OF ARGUMENT

The Court of Appeals ruled that retirees are not "employees" within the meaning of the National Labor Relations Act, that they are not members of a "unit appropriate for the purposes of collective bargaining" within the meaning of that Act, and that therefore they are not persons with whom or about whom an employer is required to bargain under that Act. These rulings, we believe, are entirely correct and are dispositive of the case. Argument on these points is fully presented in the brief of the Respondent company and is not repeated here.

This *amicus* brief seeks to present further important legal and practical considerations which support and require the decision reached by the Court of Appeals.

Pensions and insurance benefits of persons already retired are nothing more nor less than deferred compensation paid to them pursuant to the terms of contracts that were in effect during their active employment. They are governed by the terms of such contracts. To require an employer to bargain in regard to reopening such contracts and renegotiating the pensions and insurance benefits provided therein is contrary to all principles of contract law and contrary to the purpose of Congress in Section 301 of the Taft-Hartley Act to make collective bargaining agreements legally binding and enforceable contracts between the parties.

In addition, a requirement of mandatory bargaining on such matters would almost inevitably result in in-

creasing an employer's labor costs long after the labor has been performed and the articles produced have been sold, delivered and paid for. Consequently, an employer could not count on firm costs in making his plans regarding prices, profits, and other aspects of the operation of his business.

Moreover, the Board's ruling would create conflicts of interest because the union would be representing two different groups, current employees and retirees, whose interests are different and conflicting in numerous respects. The Board is unable to cope adequately with such conflicts of interest, as the Board itself has admitted in earlier cases.

If the principle of mandatory bargaining with retirees is established, the Board would almost inevitably have to put retirees in a bargaining unit of their own in some future cases where they desire to be represented by their own union in their own separate bargaining unit. This would create a situation where the collective bargaining procedures of the Act would be wholly inappropriate. The Act envisions bargaining between parties free to use their economic strength but also subject to economic restraints because both parties lose when the business is shut down by a strike or curtailed by picketing or other activities. There would be no such restraint in the case of retirees who have no current wages to lose and no jobs in which they may be replaced. Thus disputes with retirees and any accompanying picketing or other activities could continue endlessly, contrary to the purposes of the Act. As experience has shown (e.g., in the coal industry) the mere presence of retiree pickets would act as a signal and an inducement for work stoppages and thus vastly broaden the area of strikes and labor unrest.

Furthermore, there is no need for mandatory collective bargaining with retirees. Voluntary action of employers, either in the form of voluntary collective bargaining or unilateral action has been adequate to alleviate the problems of retirees and doubtless will continue to do so during the temporary period of inflation which creates the problems. Moreover, the parties are increasingly adding provisions to their pension contracts which automatically adjust benefits to changes in the cost-of-living index or other factors. Such provisions tend to resolve and eliminate the problem.

It was never contemplated by Congress that the process of collective bargaining should be projected beyond the work place and follow employees into permanent retirement; or that it should be so broadly based as to provide cradle-to-grave social security. Collective bargaining is in essence a process by which employees of a particular employer in an established bargaining unit use their collective strength to negotiate the value of their services in terms of wages, benefits and employment conditions. They may choose, and the employer may agree, that part of their wages may be deferred and paid in retirement benefits such as pensions. When their employment terminates by retirement, these benefits become vested and payable. But, since they are no longer performing services to the employer, no basis should exist for using the economic strength of the active employees to upset and renegotiate the value of their past services.

Although the Act mandates bargaining on a unit-by-unit basis, the Board seeks to modify the statutory scheme by adding a new concept of "interest" bargaining under which the unit representative would be

given authority to bargain for classes of persons such as retirees who are outside the unit. This change in the scheme of the Act could only serve to create new areas of conflict and undermine the stability of the collective bargaining process as a means for settling disputes.

ARGUMENT

1. Pension and insurance benefits of persons already retired, being simply deferred compensation paid pursuant to the terms of contracts that were in effect during their earlier employment, are not appropriate subjects for mandatory collective bargaining.

The National Labor Relations Act requires bargaining "with respect to wages, hours, and other terms and conditions of employment." (Section 8(d)) This has been interpreted to require an employer to bargain with his employees about providing pensions and insurance on the theory that such benefits are "wages" and that providing them constitutes one form of payment of wages.

After wages have been agreed upon and specified in a contract and the contract has been performed, the law does not require either party to bargain about changing them. This is true regardless of how the wages are to be paid. It is true with respect to the portion of wages which employees are to receive currently, and it is equally true with respect to any portion of wages which they are to receive as deferred compensation in the form of pension or insurance after their retirement. It is clear beyond all question, we believe, that an employer is not required by law to bargain about increasing the cash wages already paid under past contracts that have been performed. To require him to bargain about increasing the deferred

wages specified in existing or past contracts and payable after retirement is no different. In either case, he would be required to bargain about changing agreed contract terms. Such requirement would not only be contrary to all principles of contract law, it would also be contrary to the purposes of Congress in adopting Section 301 of the Taft-Hartley Act to make collective bargaining contracts legally binding and enforceable against both parties. As stated in the Senate Committee Report, "The committee bill makes collective-bargaining contracts equally binding and enforceable on both parties. . . . Such a policy is completely in accord with the purpose of the Wagner Act which the Supreme Court declared was 'to compel employers to bargain collectively with their employees to the end that an employment contract, binding on both parties, should be made.' (*H. J. Heinz & Co.*, 311 U.S. 514)." S. Rept. No. 105, 80th Cong., 1st Sess., p. 15.

Quite commonly payment of the cost of such deferred compensation is made currently by an employer in the form of an annuity premium or a payment into a pension trust or other similar fund. But whether or not paid currently, it is part of an employer's wage costs and becomes part of his operating expenses which affect his prices, profits, and the entire operation of his business. He cannot go back later and ask his customers for a retroactive price increase to compensate for a subsequent increase in costs for pensions or insurance. He must plan and operate his business on the basis of his current labor costs under his collective bargaining contracts, not on the basis of what his costs might be if those contracts are renegotiated at some future date.

If the Board is successful in establishing the principle embodied in its decision in the present case that employers must reopen prior contracts and rebargain the compensation provided therein for retirees, this could permit employees to reopen other completed employment contracts and demand higher pay or higher benefits on a retroactive basis. Far from contributing to industrial peace or the solution of labor problems, this would invite and promote a new type of industrial strife of virtually unlimited proportions and thus would have consequences entirely inconsistent with the purposes of the Act to encourage labor stability under binding agreements for fixed terms.

2. The Board's ruling creates conflicts of interest with which the Board cannot cope.

Apparently the Board recognized the weakness of its position that retirees are employees within the meaning of the Act, and it was unwilling to rest its case squarely on that ground. Apparently it also recognized that an outright ruling requiring an employer to bargain directly with retirees about increasing their pensions or other benefits provided by contract would be too serious an affront to legal and moral principles regarding repudiation of contract agreements.

Accordingly, the Board sought to ease the retirees under the wing of the union currently representing employees, with the explanation that the current employees would be acting in their own interest in seeking increased benefits for retirees. The Board's approach also serves to mix and confuse bargaining to change past contracts with bargaining for future contracts, and thus to divert attention from the fact that it involves bargaining to change the terms of contracts already performed.

In doing this, however, the Board placed the retirees in a position where they are represented by an agent having serious conflicts of interest. Moreover, the interests of the retirees will always be subordinated and submerged because the retirees have no voice in selecting the bargaining agent or in controlling its actions.

These conflicts of interest were brought to the Board's attention in briefs submitted to it. They were also pointed out in the dissenting opinion of Board Member Zagoria in this case. The Board, however, did not undertake to respond to them in its majority opinion. It ignored them for the very understandable reason that the Board has no competence, facilities, or means to deal with internal conflicts of interest in labor organizations.

The Board itself has disclaimed any expertise or facilities to deal with union conflicts of interest in any meaningful sense. In a case involving such conflict, the Court of Appeals for the First Circuit remanded to the Board "in order that it may assess the potential, not merely the actuality, of conflict of interest and frame an order which, hopefully, will balance the legitimate interests of the Fund, respondent, International, Local 380, and respondent's employees." *NLRB* v. *David Buttrick Co.*, 361 F. 2d 300 (C.A. 1, 1966). That case involved a pension fund—the Teamsters Pension Fund jointly administered by the union and employers. The Teamsters Union was seeking to obtain bargaining rights at Buttrick notwithstanding the fact that the Teamsters Pension Fund had made a loan of $4,700,000 to a competitor company where it already represented employees. Despite the serious conflict questions involved, the Board declined to carry out the Court's mandate. It sought to excuse itself from doing so on

the ground that it does not have the necessary data-gathering facilities or any special expertise in this area. In the Board's own words:

> "In respect to the establishment of safeguards or guidelines to govern union and pension fund investments generally, we share the Court's concern over the 'eroding effects' of conflicts between investment protection and employee representation, which are 'likely to arise with increasing frequency.' 361 F. 2d at 305. Yet, we find many compelling reasons for not formulating general standards in a single proceeding such as this. First, there are several elements of the conflict-of-interest problem—the necessary degree of competition, the different possible types and amounts of investments, various methods of fund administration, etc.,—which have not been developed in the case. Thus, we have reservations as to whether we are sufficiently informed to delimit the relative hazard posed by the different combinations of investment, fund administration, International control over locals, and degree of competition between employers; the participants in this proceeding have not offered a feasible means for doing so. Moreover, we feel that the raw data necessary to devise broad guidelines is not yet available. Respondent in its brief has recognized that the 'field of pension fund investment is a vast one in which much of the basic information is still in the process of compilation.' In addition, the President's Committee on Corporate Pension Funds considered regulatory measures other than the existing disclosure requirements, but failed to recommend such additional regulation in part because of the 'absence of sufficient facts as to the prevalence of abuses.' 'Public Policy and Private Pension Programs' (GPO 1965). We note that Congress is currently considering several proposals for expanding the regulation of pension funds, including certain as-

> pects of fund investments. See H.R. 5741, S. 1024, S. 1103, S. 1255 . . . ."
>
> *David Buttrick Co.,* 167 NLRB 438, at 439-40 (1967).

The Court of Appeals subsequently accepted the Board's excuse and affirmed its ruling that Buttrick must bargain with the Teamsters despite the loan to a competitor company, but it did so on the ground that "There is a strong public policy favoring the free choice of a bargaining agent by employees. This choice is not lightly to be frustrated." *NLRB* v. *David Buttrick Co.,* 399 F. 2d 505 (C.A. 1, 1968).

In the present case before this Court, however, the Board is asking the Court to ignore much more pervasive conflicts of interest and affirm its order which seeks to bring retirees under the Act as employees and at the same time denies them any voice in the selection of a bargaining representative and hence frustrates the very policy which the Court in the *Buttrick* case thought compelled it to accept the Board's ruling because that policy "is not lightly to be frustrated."

Thus the Board asks this Court to approve a ruling which gratuitously imposes on retirees a representative involved in gross conflicts of interest for which the Board has no remedy or solution other than to ignore it or pretend it does not exist. Approval of the Board's position would lay the groundwork for a large group of the very kind of cases of which this Court has said, "The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representa-

tion doctrine." *Vaca* v. *Sipes,* 386 U.S. 171, at 182-183 (1967).

It seems certain that if the Board's position is accepted the courts will soon be faced with hearing and deciding suits brought by retirees who have not consented to the agency relationship sought to be thrust upon them by the Board and who object to improper or inadequate representation by their Board-appointed agent and seek to repudiate its acts. The Board will also almost certainly be faced with demands and petitions by retirees seeking certification for other unions or associations to represent groups of retirees in separate bargaining units from active employees. This development could hardly be resisted by the Board, and its culmination would then give birth to direct competition between retirees and their representative and active employees and their representative. Thus a whole new battleground of economic conflict and competing pressures on employers would be opened up.

3. Mandatory collective bargaining, as contemplated by Congress and practiced in the industrial world, is not suitable for resolving demands and disputes of former employees.

While collective bargaining may hopefully result in peaceful resolution of disputes, it also contemplates the use of economic weapons when negotiation fails. As this Court has stated, "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *NLRB* v. *Insurance Agents Union,* 361 U.S. 477, at 489 (1960).

In the normal bargaining situation, a party using such economic weapons is subject to certain built-in restraints. Thus the striking employee, while he exerts

economic pressure on his employer, is also under economic pressure to return to work and resume earning and to avoid being replaced. Similarly, the employer who exerts economic pressure on his employees by a lock-out is, at the same time, under economic pressure to resume normal operation and full production, and to supply his customers and avoid losing them to competitors. Thus the Act envisions bargaining in which the use of economic power is tempered and balanced by countervailing economic restraints.

In the case of former employees, however, there is no such restraint. They have no current jobs or earnings to lose, and no present employment in which they might be replaced. Moreover, as indicated, it seems very likely that in some future cases retirees would be placed in their own bargaining units separate and apart from all active employees, and thus all economic restraints would be removed from the unit.

Although former employees might not have effective strike power of their own, they would have unlimited picketing power with nothing to induce them to cease except capitulation by their former employer. There would be little to prevent retirees from picketing their various former employers almost without limitation. Such picketing alone could be detrimental to the employer's business, and if other employees or unions observe the picket line it could prove to be completely ruinous.* It is apparent, therefore, that a holding that former employees have a right to bargain, and to use economic weapons as part and parcel of that right,

* It is widely known that one union, the United Mine Workers, has utilized retired miners to picket mines and create illegal work stoppages throughout the industry in furtherance of both economic and political objectives.

would invite demands from such former employees that would result in interminable disputes not capable of resolution through collective bargaining.

Thus such holding would have results completely contrary to the policy of the Act to promote settlement of disputes by peaceful means.

4. The Board's extension of the statute to retirees is not justified by need

The Board and the petitioner union and the amicus unions have sought to justify extension of the Act to cover retirees on the ground that there is an unfilled need for mandatory collective bargaining in their behalf. The Board's opinion put it in strong terms—that after an employee has retired is when he "most needs representation." If that were true, the Board would have certainly discovered it sooner than 34 years after enactment of the statute. Even if such need existed, we submit, it would be a matter for Congress to deal with and would not justify administrative and judicial extension of the present statute beyond the fair meaning of its words and beyond the intent of Congress.

Moreover, the Board is in error, we submit, by presuming that the social needs of retirees can be best met by bringing them under mandatory bargaining, including the implicit assumption that the burden of inflation as it affects retirees should be borne by the individual employer.

As illustrated in the examples set forth at page 28 of the Board's brief in this case, employers are not insensitive to the economic problems of retirees resulting from the inflationary trend of the past decade or so. Many employers have voluntarily improved pensions and insurance benefits of retirees so far as they

reasonably could within their means and in light of their other obligations. Some have done so entirely of their own volition, whether or not their employees are unionized. Some have done so after consultation and discussion with unions which might be labeled collective bargaining. But in all cases employers have taken such action voluntarily. The bargaining, if any, was voluntary and permissive, not mandatory under the statute. Such voluntary action of employers has gone far to alleviate the problems and doubtless will continue to do so. Far from being a reason to require mandatory bargaining, this is a reason not to.

Moreover, the parties to collective bargaining have already developed means for accommodating pensions and other deferred compensation to the changing economic conditions of the future. They have provided in their contracts for variable annuities or flexible pensions that increase or decrease automatically in a specified relation to the cost-of-living index or in relation to the income and value of the stocks, bonds, mortgage loans, real estate and other assets in which a pension fund is invested. Obviously, as such flexible arrangements become more and more usual in collective bargaining contracts, the problem of adjusting retirees' pensions to changing economic conditions resolves itself.

Apart from, and in addition to, voluntary adjustments, the Congress will undoubtedly give full and sympathetic consideration to the situation of retirees and take appropriate action. The Congress has already demonstrated its interest in retirees and its sensitivity to their problems in a number of ways—periodic increases in social security benefits, Medicare and Medicaid, creation of a Special Committee on Aging,

protection of pension and insurance plans in the Welfare and Pension Plans Disclosure Act, among others. It is even possible that the Congress might sometime conclude that some form of representation is desirable for retirees. But it is also quite possible that if it does so, it would deal with that subject through legislation entirely separate and apart from the National Labor Relations Act, just as it has already dealt with protection of pension and insurance plans in a separate statute. All of this, of course, is a matter for Congress to determine, and is not within the authority of the Board or the courts.

5. The Board's erosion of the statutory concept of unit bargaining threatens the stability of the bargaining process.

As the Court below noted, and as this Court said in *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965), the Act mandates bargaining on a unit-by-unit basis. In its decision here, however, the Board espouses a new concept of "interest" bargaining, and while acknowledging that it has consistently excluded retirees from bargaining units the Board seeks to expand the bargaining authority of the unit representative to encompass bargaining for classes of persons such as retirees who are outside the unit. This is done on the assertion that benefits paid retirees "affect" employer funds otherwise available for paying wages and benefits to active unit members. This type of proliferation of the authority of the unit representatives can only serve to create new areas of conflict and undermine the stability of the collective bargaining process as an instrument for settling disputes.

CONCLUSION

For the foregoing reasons, as well as those set forth in the company's brief, we respectfully submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~691~~ 70-39

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

PITTSBURGH PLATE GLASS COMPANY,
CHEMICAL DIVISION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE*
BY UNION CARBIDE CORPORATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 961

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

PITTSBURGH PLATE GLASS COMPANY,
CHEMICAL DIVISION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* BY UNION CARBIDE CORPORATION

Opinions Below

The opinion of the court of appeals is reported at 427 F. 2d 936. The decision and order of the Board are reported at 177 NLRB No. 114 (App. D, pp. 23-55).

Jurisdiction

The judgment of the court of appeals (App. B, p. 21) was entered on June 10, 1970. The Board's timely petition for rehearing en banc was denied (Judges Edwards and McCree dissenting) on July 31, 1970 (App. C, p. 22). On

October 16, 1970, Mr. Justice Stewart extended the Board's time for filing a petition for a writ of certiorari to and including November 16, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Statutes Involved

The relevant statutory provisions are set forth in the Appendix, *infra*, pp. 43-47.

Questions Presented

(1) Does Section 8 (a) (1) and (5) of the National Labor Relations Act as amended require an employer to bargain with a union for individuals who are not employees as that term is defined in the Act?

(2) Whether the National Labor Relations Act requires bargaining on the subject of benefits for retirees after they have shed their employee status where practice in large segments of industry is not to bargain over such subjects.

Statement

UNION CARBIDE CORPORATION hereby submits a brief in this proceeding as amicus curiae in support of the position taken by the Respondent, PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, and in demonstration of its interest in this matter states as follows:

1. Union Carbide Corporation was incorporated in the State of New York in 1917. It is engaged in the manufacture of chemicals and other industrial products and it operates throughout the forty-eight continental states of the United States and elsewhere throughout the world.

Union Carbide Corporation has approximately 71,600 employees in the continental United States, of

whom about 37,300 are hourly paid. Approximately sixty-nine percent of such hourly paid employees are represented by a wide variety of unions for the purpose of collective bargaining, with whom Union Carbide Corporation has entered into more than one hundred collective bargaining agreements. All employees, both hourly and salary, are covered under a variety of benefit plans.

2. Negotiations have been conducted periodically with the various unions representing Union Carbide Corporation employees with respect to employee benefit plans. However, such bargaining has never taken place for any individuals except active employees on current payrolls. Union Carbide Corporation has not engaged in collective bargaining with any union as to installation, alteration or change of any benefit for retirees after they have left Union Carbide Corporation's employ. Such a practice is common in the chemical and allied industries; it is one which similarly characterizes the posture of numerous companies in every field of American industrial and business endeavor. It is a practice, moreover, which many unions have not yet sought to change or alter or intrude into the bargaining relationships between themselves and their employers. It is Union Carbide Corporation's knowledge and experience that the *absence* of bargaining over retirees' benefits after retirement is far more common than its presence, and the instant petition to reverse the court below is not supported by normal industrial practice. Moreover, Union Carbide and many other employers have never regarded such matters as subject to mandatory bargaining under the National Labor Relations Act. If the National Labor Relations Board succeeds in imposing such obligation on employers generally, contrary not only to the clear language and explicit intent of the Act, but also to the "customs, habits and usages" of a substantial number of companies throughout American industry, Union Carbide Corporation and many others similarly situated would be required to alter a uniform practice of many years' standing, never challenged at any previous time, formally or informally. The

result would be moreover, to create a chaotic condition nationally which would force employers to bargain with unions for two categories of individuals whose basic interests are decidedly dissimilar and, indeed, are in basic conflict. Retirees cannot and do not have any mutual interest with active employees in numerous matters embracing all customary subjects of bargaining concerning wages, hours, and other terms and conditions. Active employees have nothing in common with and no concern over any benefits accorded retirees, and the results of such forced bargaining on employers generally will be to proliferate disputes; prevent ready settlement of bargaining negotiations; increase the liklihood of strikes and picketing; and surely contribute added burdens on interstate commerce.

3. Union Carbide Corporation respectfully submits that it subscribes to the argument advanced by the Respondent in its brief, and submits further that the information and argument contained in the body of its brief below may assist this court in its consideration of the case.

4. The following brief, amicus curiae, is filed as provided in Rule 42. Written consent of the Solicitor-General on behalf of Petitioner, and of the Respondent to the filing of this brief has been secured, as required by Rule 42.

5. The findings of fact, and the decisions of the Board and the Sixth Circuit Court of Appeals reversing the Board's ruling are fully set forth in the briefs of the other parties hereto and the record, and need not be repeated here.

ARGUMENT

Introduction and Summary of Argument

Conceding that employers and the unions who represent their active employees are required under the Act to bargain over pension and insurance benefits to be given such individuals after they retire from employee status does not alter the fact that such individuals doff their employee status when they retire from employment as surely as when they leave employment in other ways, such as, layoff, quit, termination, etc. The Act no longer applies to them in any way, since they no longer come within the definition of "employee" in Section 2(3) thereof for any purpose whatsoever.

Consequently, no retiree can claim any right under the Act against his former employer, nor can a union invoke it on his behalf where such individual has no standing to come within the ambit of the Act. The legislative history of the statute clearly attests to the intent of Congress not to include retirees under the scope of Section 2(3), as do previous long-standing decisions of the Board which explicitly deny employee status to a retiree for union representation purposes.

Moreover, the bargaining obligation of an employer extends, under the specific language of the Act, only to representatives of "his employees." Clearly and beyond question, a retiree is one who has severed his connection with his former employer, and, by definition, is not and cannot ever again be one of "his employees." The Act imposes no duty on the employer to bargain with any union as to any matter unless the union represents, and the matter concerns, those currently employed within the certified or recognized bargaining unit. Any attempt of a union to bargain for anyone else is properly refused by the employer, who need negotiate only within the scope of his statutory obligation.

Retirees are not left remediless against a former employer who seeks to deprive them of any rights to any benefits that may have accrued to or been furnished them after retirement. They may enforce these obligations in the courts through well-established forms of action both legal and equitable, and need no additional remedy arbitrarily grafted onto the Act by an expansionist administrative agency.

Including retirees as employees, moreover, would violate the basic purposes of the Act which are aimed at protecting "workers." This purpose rests on Congress' unquestioned right to legislate on matters affecting interstate commerce. But what retirees do or do not do on retirement has no effect on commerce; has no bearing on the promotion of industrial peace, a major purpose of the Act; and reasonably cannot affect the course of bargaining at any plant location. There is no visible, overall industrial practice to bargain on behalf of retirees with unions representing active employees, and there is no mandate under the law for the Board to change such practice by administrative enlargement of the Act into an area Congress itself clearly did not cover.

I. The Act Does Not Require an Employer To Bargain With a Union on Behalf of Individuals Who Are Not Employees.

Much of the argument of the National Labor Relations Board in support of the effort by the Board to reverse the court ruling below in this matter addresses itself to the question of whether the subject-matter of benefits for individuals who have already retired may be the subject of mandatory bargaining under the National Labor Relations Act. Such arguments obviously place the cart before the horse; no collective bargaining is required by the Act of any employer on any subject-matter whatsoever with respect to

any individual who is not an "employee" within the meaning of Section 2(3) of the Act at the time such bargaining is sought.

The Court below regarded such a conclusion as self-evident; the contrary decision by the Board is a perfectly obvious attempt to exercise by administrative interpretation the legislative functions reserved to Congress which should not go unchallenged. As will appear, Congress has expressly disapproved of the Board's past efforts to extend the definition of "employee" under Section 2(3) to sweep within the ambit of the Act individuals whom the statute clearly does not, and was never intended to, cover. The Board has previously stated it will give effect only to the "plain meaning" of words used (*F. W. Woolworth,* 111 NLRB 766 (1955), and this Court should see that it does so in this matter.

As the Court below stated (*Pittsburgh Plate Glass Co.* v. *NLRB* 427 Fed 2d 936 at page 943):

> "The Labor-Management Relations Act enjoins employers to bargain collectively and in good faith with the bargaining agents of their employees about 'wages, hours, and other terms and conditions of employment.' It is well established, and not in dispute here, that pensions and insurance benefits to be enjoyed by employees after retirement are 'wages' for the purposes of the statute, albeit deferred ones, and that insofar as they accompany a provision specifying a mandatory retirement age, as is present in this case, they are also 'conditions of employment'." *W. W. Cross & Company,* 77 NLRB 1162 (1948), enf'd, *W. W. Cross & Company* v. *NLRB,* 174 F. 2d 875 (1st Cir. 1949); *Inland Steel Company,* 77 NLRB 1 (1948), *enf'd, Inland Steel Company* v. *NLRB,* 170 F. 2d 247 (7th Cir. 1948), *cert. denied on this issue,* 336 U. S. 960; *National Labor Relations Board* v. *Black-Clawson Company,* 210 F. 2d 523 (6th Cir. 1954).
>
> "However, the issue in this case is not whether retirement benefits for *active* employees are manda-

> tory subjects of collective bargaining. The issue is, once retirement benefits have been negotiated for active employees who have retired and begun collecting benefits, whether an employer may propose improvements in benefits to the retirees individually, or whether retirees are 'employees' under section 8(a)(5), changes in whose benefit must be collectively bargained with the union. We find that retirees are not 'employees' within the meaning of section 8(a)(5) and that the Company was under no constraint to collectively bargain improvements in their benefits with the Union."

The results of legitimatizing any departure from such principles will be readily predictable: confusion; distortion; total lack of logic; the unwarranted imposition of burdens on employers that they were never intended to shoulder; and extending the Act into areas where the flow of interstate commerce (which the Board is required to protect under the Act) does not penetrate. The lengths to which the Board must reach in arrogating to itself the responsibility for such results are apparent. Its petition boils down to an effort to claim that an individual who may have at one time enjoyed "employee" standing must continue to fall within the Section 2(3) definition of employee after he has shed such status. Such a proposition is demonstrably absurd.

A. Only Employees Are Given Rights Under The Act.

Section 2(3) of the National Labor Relations Act, as amended, reads as follows:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any in-

> dividual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

This definition clearly is a limited one; it does not in any sense, nor by its terms, include an individual whose employee status has ceased *except* where it has done so as the result of an unfair labor practice. The fact that only an individual "whose work has ceased" for one reason only continues to enjoy employee status for purposes of the protection of the Act is clear indication that Congress has specifically excluded any person whose work had ceased for any other reason from retaining employee status. An individual whom Congress has omitted cannot possibly be subjected to the Act by the Board through mere interpretation. The question is not whether an individual comes within the specific *exclusions* of Section 2(3); the question is whether an individual such as a retiree who is simply not an employee under either the Congress' intendment; or any reasonable conception of the term, can be made into one by virtue of his previous status which he has legitimately shed.

The point is, of course, that only employees have been accorded rights under the Act with respect to their employers. Non-employees do not have such rights. Indeed, the Board has frequently taken this position as to individuals in such non-employee status, even though some residual connection with their former employer still remains. See, for example, *Sullivan Surplus Sales,* 152 NLRB 132 (1967), where "employees" on indefinite leave of absence, whose return was within their own discretion, were held not to be employees under Section 2(3).

This is a fundamental matter imperfectly understood—or at least imperfectly articulated—by the Board. However, it can and should be bluntly stated at the outset that

an individual who is not an "employee" does not have the protection of nor is accorded any rights under the Act whatsoever. Section 7, which is the heart of the NLRA, states clearly that:

> "*Employees* shall have the right to self-organization, to form, join, or assist labor organizations, to *bargain collectively through representatives of their own choosing,* and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. (Italics ours)"

Plainly, no one who is not an "employee" as that term is defined in Section 2(3) of the Act can claim any right thereunder (regardless of the rights or protection available to him in other connections). No such individual can assert the right to bargain collectively, nor can any one assert it on his behalf so far as this Act is concerned. No such individual can claim the protection of the Act in respect to any activity whatsoever, concerted or otherwise, in which they may engage.

This is not a particularly startling concept; the Board has often expounded it with regard to such individuals as supervisors; employees of state or municipal governments; or of the railroads; agricultural employees; and others where, once the non-employee status of such particular individuals has been established, the Board has had no trouble in regarding them as wholly outside the Act's umbrella. See, for example, *Arkansas Valley Industries,* 167 NLRB 47 (1967) (agricultural laborers not employees); *Akron Engraving Co.,* 170 NLRB 22 (1968) (supervisor not employee); *Capital Transit Co.,* 114 NLRB 617 (1955) (discussing Board principles as to supervisors), *Civilian Cafeteria Board,* 106 NLRB 208 (1953) (government employees); *Goodyear,* 112 NLRB 30 (1955) (railroad employees).

B. Loss of Employee Status For Legitimate Reasons Customarily Terminates Employer Bargaining Obligations to Such Employee or Unions.

No one reasonably contends that an employer must bargain over terms and conditions of employment of an individual promoted even temporarily from the bargaining unit to a supervisory position at the same location, *Frank G. Shattuck Co.*, 106 NLRB 838 (1953); *U. S. Gypsum Co.*, 114 NLRB 523[1] (1955). The reason is clear; such an individual is no longer an "employee" within the meaning of Section 2 (3) of the Act. The same principle has frequently been applied to individuals who have been laid off or terminated from employment; no obligation whatever exists requiring any employer to bargain over the post-employment terms, conditions or status of such former employees, *Thomas Electronics, Inc.*, 109 NLRB 1141 (1954). Decisions that appear to be contrary are in fact in accord with such a basic proposition.

Thus, the thrust of various rulings beginning with *Phelps Dodge* v. *NLRB* 313 U. S. 177 (1941), as clearly restated by the Court below in construing Section 2(3), either affects solely individuals who would have been employees but for an employer's unfair labor practices, or is strictly limited to bargaining over terms and conditions of entry into, or departure from, the bargaining unit, or employee status during the individual's sojourn in the unit. Terms and conditions of entry to or departure from employment are clearly a legitimate subject of bargaining for employees currently employed. So is the setting of terms and conditions of work that will affect individuals who are prospective employees *after* they will have become employees. The terms, conditions and benefits negotiated for an employee *while he retains that status* are bargainable even though the actual realization of such benefits is deferred.

[1] Declaring as supervisors and not "employees" certain individuals who regularly substituted for foremen for parts of a week, even though they were bargaining unit employees at other times.

However, not one case or decision by the courts or the Board can be found that has ever required an employer to bargain with any union over the status of an employee before or after he has undertaken or left his employment. Even the *Chemrock* holding, 151 NLRB 1074 (1965), that a successor employer must bargain with the union representing his seller's employees in some circumstances is based on the concept of the retention of employee status; it relies on the continued existence of the bargaining unit, despite a change of employers.

The language of the Act itself is crystal clear in its limitations in this area. Section 8 (a) (5) merely requires an employer to bargain with a representative of *his* employees. The Board will not certify as an appropriate bargaining representative a union which purports to bargain not only for employees, but also for non-employees. Thus, the Board does not certify unions which include supervisors (who are clearly not employees under the Act's definitions) and non-supervisors; or which represent both guards and non-guards, *A. D. T. Company,* 112 NLRB 80 (1955). Section 9 (a) of the Act, moreover, requires employee representatives to be selected by "employees" in an appropriate unit to represent such "employees" and no one else. It follows, and the Board and the courts have often and consistently so ruled, that a bargaining agent which represents both employees and non-employees need not even be recognized by the employer for purpose of bargaining, let alone dealt with over the negotiating table, *Douds* v. *International Longshoremen's Association,* 241 Fed 2d 278 (CA 2, 1957); *United Mine Workers* v. *Pennington,* 381 U. S. 657 (1965), *Ainsworth Manufacturing Company,* 131 NLRB 273 (1961). No other signficance can possibly be or has been ascribed to the language and structure of the Act. It follows that a union purporting to bargain for "non-employees" cannot invoke the protection of the statute any more than the non-employees. Such a union would be endangering its very unit certification, and its representation and bargaining rights.

Where retirees are not employees under Section 2(3), they have no rights at all under the Act; an employer need not bargain as to them with any union whatsoever, let alone a union which merely represents his own employees in an appropriate unit which excludes retirees. None of the provisions of the Act inhibit or prescribe the employer's relationship to such persons. Absent such statutory obligations to such individuals, there is no public interest that the Board or this Court may enforce in this case.

It is, then, of crucial importance in this matter to determine who are and who are not employees under Section 2(3) of the Act. A finding that retirees are not employees would automatically absolve the employer from any obligation to bargain with the union.

II. The Term "Employee" Under Section 2(3) of the Act Does Not Include a Retiree.

We have already seen that Section 2(3) of Act defines the term "employee" to include former employees only where their work has ceased as the result of an unfair labor practice, and does not include former employees whose work has ceased for any other reason. No claim is made that the individuals here involved ceased work for any but wholly lawful reasons. No claim is made that the individual retirees here are encompassed within the normal definition of the term employee spelled out in all dictionaries as one who *works* for a wage or salary for an employer. There is, in truth, not even a claim that these individuals are members of the working class, generally; indeed, their very status of "retirement" is the complete negation of any reason to ascribe employee status to such individuals.

In the face of such an undisputed situation, what warrant can possibly be found for avoiding the rational use of the English language, and failing to apply the plain meaning of the term employee. The warrant is not found in the language of the present Act. Nor, indeed, is it even found in the language of the original statute.

True, under the National Labor Relations Act, as passed in 1935, the term "employee" in Section 2(3) is simply defined as:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

Perusal of the Board's position reveals that it has been relying on a return to such language by way of "avoidance" of what is euphemistically called a "narrow definition" of the term employee. The Board would include in it an individual as to whom it conceded in its decision below "most of the threads that once bound him to the bargaining unit are severed" and he retains merely "retirement rights." The Board claims reliance on "the realities of human behavior," and "national policies (citing the Clayton Act) which reject the view that workers are human machines," as justification for its redefinition of the term "employee." It cites as supporting this essentially non-legal view solely the case of *NLRB* v. *Hearst Publications,* 322 U. S. 111 (1944) decided under the 1935 version of the Act. However, this opinion no longer can support the Board because the Court's ruling in that case was specifically rejected by Congress in 1947 which disapproved the Board's seeking to do exactly the same sort of thing it is trying to do here. Neither the Board nor the Court can ignore such an unmistakable expression of Congressional intent.

Indeed, even *Hearst* is no warrant for casual expansion of the term employee to include retirees. This decision, even prior to Congressional disapproval, was no blank check to reinterpret the Act. This Court was not therein

concerned with making a retiree into an "employee" but in ensuring that a broad definition of what constitutes an actual *work* relationship was followed, such that employers could not escape bargaining obligations as to its *workers* by misuse of the term "independent contractor." The Court quite obviously did not mean to establish in "employee" status one who enjoys no working relationship with the employer at all.

A. Congress in 1947 Disapproved Broad Use of Term Employee.

The language added by Congress, when considering the 1947 Labor-Management Relations Act amendments to the original 1935 National Labor Relations Act, specifically disapproved of the broad sweep to the term "employee" that was enunciated in *Hearst*. It did so in language which beyond question set forth its intent as to the scope to be given the term "employee" as used in the Act. The enactment of the Act with Congressional disapproval of *Hearst* is binding under fundamental terms of statutory construction that need not be labored here.

Specifically, Congress said (H. Rept. 245 on HR 3020 at p. 17):

> "In the case of *NLRB* v. *Hearst*, the Board expanded the definition of the term "employee" beyond anything that it had ever included before and the Supreme Court, relying on the theoretic 'expertness' of the Board, upheld the Board . . . it must be presumed that when Congress passed the Labor Act it intended words to have the meanings they had when Congress passed the Act, not new meanings that the Labor Board might think up 9 years later. In the law, there has always been a big difference between employees and independent contractors. *"Employees" work for wages and salaries.* . . . It is inconceivable that Congress when it passed the Act, authorized the Board to give to every word in the Act whatever meaning it wished. On the contrary, *Congress intended then and it intends now that the Board give to words not far-fetched meanings but ordinary meanings."*

The fact that the Board still (p. 22 of its brief) cites *Hearst,* despite such disapproval, as the only Court buttress of its case, beyond peradventure shows the poverty of its case.

The House passed HR 3020 with the exact definition of "employee" fashioned in the House Labor Committee. After favorable action by the Senate on its companion bill, the differences were adjusted in conference. The Conference Report followed and adopted the House Report language and the provisions of its bill with respect to the language of Section 2(3), which in turn became the final version of the LMRA as it was enacted in 1947. The House language above has become inescapably embedded in the law, and cannot be lightly cast aside as the Board now intends.

It is thus quite clear that Congress intended the term "employee" in Section 2(3) to be given its ordinary meaning in the administration of the Act. It disapproved clearly and specifically any extension of that meaning.

The ordinary meaning of the term "employee" then, which Congress specifically required the Board to apply, is clear: An employee is defined in Webster's Standard Dictionary as:

> "One who works for wages or salary in the service of an employer."

B. Neither the Board nor the Courts Have Held a Retiree to be an "Employee."

No amount of circumlocution will alter the wholly unmistakable fact that retirees simply do not and cannot come under the dictionary definition. Any other result would plainly contradict the bluntly-expressed intent of Congress, which the Board has obviously overlooked in its haste to do the very thing that Congress has cautioned it against doing. See *NLRB* v. *Steinberg & Co.*, 182 Fed 2d 850 (CA 5, 1950) where the court said:

> "As in the Social Security Act and the Fair Labor Standards Act, the term "employee" is not defined

> in the National Labor Relations Act and the authorities have been at variance in the past as to the "test" to be applied in determining whether or not an employment relationship exists under this and similiar remedial legislative acts. However, the legislative history of the Taft-Hartley Law, which was adopted in 1947 as an amendment to the National Labor Relations Act, shows quite clearly that when Congress passed the Labor Act it intended the word "employee" to mean someone who works for another for hire and this clear expression of Congressional intent we are obligated to follow."

The 5th Circuit Court of Appeals agreed that the clearly-expressed intent of Congress should be followed. We submit that this decision represents the fundamental legal principles that must be applied here. See *NLRB* v. *Phoenix Mutual Life Ins. Co.*, 167 Fed 2d 983 (CA 7, 1948) cert. den. 335 US 845 (1949).

Nothing has been adduced in the other federal circuit court rulings, heavily relied on by the Board as purporting to show language which defines the term "employee" to include a retiree. A careful reading of the complete decisions in these cases makes it clear that the court was in each instance concerned not with the term "employee," but whether the term "beneficiary" of a welfare fund trust was restricted or could, under Section 302(c)(5) of the Act, include a retiree enjoying the trust benefits established for him when he had employee status under Section 2(3), in contemplation of his retirement from such status, and which were to be maintained by contributions of the employer without regard to his "employee" status.

Blassie v. *Kroger*, 345 Fed 2d 58 (CA 8, 1965); *Teamsters Local 688* v. *Townsend*, 345 Fed 2d 77 (CA 8, 1968) and *Garvison* v. *Jensen*, 355 Fed 2d 487 (CA 9, 1966) are related cases, of which the initial ruling is in *Blassie*; the other two follow only in part the main ruling. These are adduced as holding that, for purposes of Section 302 of the Act, the term "employee" is intended to include both cur-

rent and retired employees. Hence, it is reasoned, the same definition would govern Section 2(3). The Board has grossly distorted the effect of these cases; they in no sense whatever even define the term employee. Indeed, *Blassie* rules that an individual who has retired and for whom no contributions were made to the welfare plan trust prior to retirement cannot be a beneficiary thereafter. *Garvison* saw no prohibition in Section 302 against such contribution.

The court in *Blassie* does devote a portion of its opinion to resolving the question of "Retired Persons as Beneficiaries," 345 Fed 2d, at p. 68, yet the same court also, a few lines farther on, flatly states that

> "An employee ordinarily is a person presently engaged in active employment. He is "one employed by another; one who works for wages or salary in the service of an employer." Webster's Standard Dictionary (1960 2d Ed. p. 839)."

The court then concluded that benefits of the trust need not be "confined in their enjoyment to the period of the employee's active employment . . . Our conclusion is that retired persons may be beneficiaries." The court made it quite clear that its remarks were confined solely to the question of retirees as beneficiaries; it was not even asked to consider the question of whether they were employees under Section 2(3), let alone the question of whether the employer was obliged to bargain with their former union on their behalf after they had been severed from employment via retirement.

The other companion cases are devoted to the same issue. They, no more than *Blassie,* can be cited in support of mandatory bargaining by an employer as to retirees. As the Court below said, in rejecting the attempt to label *Blassie* as relevant to this instant case (147 Fed 2d 936 at 948):

> "We are similarly unpersuaded by the analogy made by the Board between the word "employee"

as that word has been construed for the purposes of Section 302 of the Labor-Management Relations Act, 29 U. S. C. § 186 (1964), *see, e.g., Blassie* v. *Kroger,* 345 F. 2d 58, 68-71 (8th Cir. 1965), and the word "employee" as it appears in Section 8(a)(5). Section 302 is a criminal provision, making it a misdemeanor for an employer to make payments to a union representing his employees. Section 302(c), under which *Blassie, supra,* was decided, exempts from the operation of the section employer contributions to, *inter alia,* employee trust funds, among which are pension and retirement plans. Not to regard retirees as employees for the purposes of that section would frustrate the purpose of retirement trusts, which have been designated as mandatory subjects of bargaining, by making distributions to retirees from them illegal. The Board's argument that it is an "anomaly" to treat the word differently under the two sections is itself an anomaly.

We also reject the Board's argument that the interpretation of the word "employee" by the Internal Revenue Service under Sections 401(a) and 501(c)(9) of the Internal Revenue Code of 1954, 26 U. S. C. §§ 401(a) & 501(c)(9) (1964), is dispositive of the issues in this case. *See* 26 CFR §-1.401, *as-revised,* Jan. 1, 1969."

C. Individuals Lawfully Severed From Employment Not Employees Under the Act.

The real hurdle posed for the Court in this case is whether or not an individual who has been lawfully severed from his employment can nevertheless continue to enjoy employee status; to remain, *as an employee,* in a bargaining unit of workers who are in an employment relationship; and to be required to deal with his former employer only through his former union. Yet a retiree stands in no different position than any other lawfully terminated employee. The Board has never considered employees who were lawfully discharged for cause and not in violation of the Act to be employees, *Booth Broadcasting Co.,* 134 NLRB 817 (1961). *Cone Mills,* 107 NLRB 866 (1954). *Vogue Art Ware,* 129 NLRB 1253 (1961).

The Board has never considered as employees individuals who have been laid off from employment for lack of work or other legitimate reason and who have no real expectation of reemployment within a reasonable future time, even though such employees remain on the employer's recall list. See *Sharco Mfg. Co.*, 112 NLRB 1519 (1955), which held a laid off employee ineligible to vote in an election even though he was subsequently rehired. "The criterion," the Board said, "is whether at the time of the election he has a reasonable expectation of reemployment as a regular employee in the foreseeable future." The fact that they have continued seniority rights does not entitle laid-off individuals to participate in voting in a representation election. *Owens-Illinois Glass,* 114 NLRB 387 (1955). *National Foundry of New York, Inc.,* 112 NLRB 1214 (1955), (employer stated he would not reinstate employee). An employee who was told he "would be rehired if feasible" was not eligible to vote in *Associated Business Service,* 107 NLRB 219 (1953).

Further, an employee absent for physical illness who had been ruled "not reemployable" by the company doctor, was held not able to vote. *A. O. Smith Corp.,* 115 NLRB 5 (1956). The Board in *Public Service Corporation of New Jersey,* 72 NLRB 224 (1947) expressed grave and substantial doubts that pensioners are employees. It said:

> "We have considerable doubt as to whether or not pensioners are employees within the meaning of Section 2(3) of the Act, since they no longer perform any work for the Employers, and have little expectancy of resuming their former employment. In any event, even if pensioners were considered to be as employees, we believe they lack a substantial community of interest with the employees who are presently in the active service of the Employers."

In *W. D. Byron and Sons,* 55 NLRB 172 (1944), the Board was even more explicit. Here, the Board stated, with respect to pensioned retirees, whom the employer had a right to recall to work but had not done so:

> "Since it appears that the pensioners have little expectation of active employment at the tannery, we shall exclude them from the bargaining unit of regular production and maintenance workers." 55 NLRB at 175.

In *J. S. Young Company,* 55 NLRB 1174 (1944), the Board excluded from the bargaining unit a retired pensioner, although he was actually employed at certain "odds and ends" work in the plant.

The main brief of the Solicitor-General on behalf of the Board concedes at page 25 that the Board currently regards and will continue to regard pensioners as excluded from the bargaining unit and so "ineligible to vote in Board election because they do not share a sufficient community of interest with active employees." Such a concession plainly negates the whole Board claim that retirees are employees.

All of the above lines of cases are distinguished by a major point of common linkage; the principle that any employee validly severed or terminated from a bargaining unit has no employee status with respect to that unit, and so cannot claim the use of the Act, regardless of the reason for severance, except in three situations; first, that he has reasonable expectation of reemployment; or second, that he was severed because of unfair labor practices; or third, he was on strike and, if the strike was economic, he had not been replaced. The bulk of such persons are, it will be discovered, those who would have attained or kept such a relationship but for the employer's unfair labor practices. Such is the basic thrust of the line of cases beginning with *Phelps Dodge* v. *NLRB,* 313 U. S. 177 (1941) and continuing through *Goodman Lumber,* 166 NLRB 48 (1967); *Local 872, ILA,* 163 NLRB 89 (1967) and *Chemrock Corp.,* 151 NLRB 1074 (1965).

But none of the above three exceptions to the rule applies to the retirees here or to retirees generally. To repeat,

no person or individual who has been *validly* severed from, or refused, employment has ever been deemed by the Board or the courts to have "employee" status after severance or prior to employment.

D. Board Violates Its Own Standards By Its Ruling In This Case.

It is, of course, correct to say that many of the above cases deal with an individual's right to vote in a representation election. It is equally correct to say that such eligibility does not always depend on employee status. But the point of the above line of cases is that the Board eliminated the retirees' eligibility to vote on the basis that such persons were not in fact sufficiently related to the bargaining unit, because of lack of expectation of future connection therewith, to be deemed employees. Employees, after all, are given in Section 9(a) of the Act the right to vote for their collective bargaining representatives; and the Board has no statutory warrant to deny them such rights unless they are not employees. Hence, the total relevancy of the findings in those cases to the instant case may be seen. In all such matters, retirees are in exactly the same situation, and (as the Board itself points out) individuals may not lack employee status under one section of the Act and acquire it under another.

Member Zagoria in his dissent in this case made precisely this point:

> "The Board did, at one time, as in *Wasson* [105 NLRB 373], make a distinction between unit inclusion and eligibility to vote. It no longer does so for reasons precisely in point here; if an employee has sufficient interests to be included in the unit, he should be given a voice in the selection of a bargaining representative; if he is not given such voice, he should not be included in the unit."

So did the Trial Examiner in his dismissal of the complaint here, in the following cogent words:

> "Further, the Board has specifically held that retired persons formerly employed in a unit are ineligi-

> ble to vote in an election to determine whether a collective-bargaining agent shall represent the employees currently working in that unit. *Taunton Supply Corp.*, 137 NLRB 221, 223 (1962); *W. D. Byron & Sons;* 55 NLRB 172, 175 (1944). If retired persons are excluded from a unit for the purpose of voting for a representative of that unit, manifestly they also should be eliminated from the unit for purposes of collective bargaining relating to employees in that unit."

The allegation in the Board's brief at page 24 that its rulings excluding pensioners from voting are not based on rulings that they are not employees is a complete misreading of the Board's own doctrines. In *Byron,* the Board clearly said that

> "We have considerable doubt that pensioners are employees under Section 2(3) of the Act."

See also the discussion regarding *Briggs,* in subsection E below.

Whom the Board really considers employees, moreover, may most readily be discerned in the numerous cases which deal with the question of whether particular individuals are employees or are independent contractors. The Board, for example, found not to be employees certain persons engaged in hauling operations for an asserted employer, who were "free to work or not as they see fit and to haul in the manner they deem best" *L. C. Sinor & Standard Industries,* 168 NLRB 67 (1968).

Indeed, the various line of cases such as *NLRB* v. *Hearst, supra* and *Houston Chapter AGC,* 143 NLRB 409 (1963), 349 Fed 2d 447 (CA5), cert. den, 382 U. S. 1026, which have dealt with the question of whether particular individuals are employees or independent contractors have all turned on the Board's long-standing "right of control" test. This itself has long defined an employee as one as to whom the employer has retained control over the method, manner and means of carrying out his employment tasks,

as opposed to mere control over the end result of such projects, which would characterize an independent contractor.

The Board cannot, it must be repeated, say that an employee is defined as one thing for one purpose and another thing for another. If the test of an employee relationship is the retained right of control, then clearly no such right has been retained for retirees. The employer has no right at all to tell retirees what to do; no right to require them to perform any services for the employer; no right to control for whom, if anyone, he works, nor any phase of his activity whatever. Based on the Board's right of control test, which is uses to determine employee status, it cannot possibly find any retiree to be an employee. The entire character of such a person, indeed, makes him the very antithesis of an employee.

E. Board Narrowly Defines Employee For Bargaining Purposes.

There has been some effort made by the Board in this case to say that an employee is "anyone in the working class," citing *Briggs Manufacturing Company,* 75 NLRB 569 (1947), because of the language of Section 2(3) stating that the term employee is not limited to employees of a particular employer. This claim plainly begs the question. Indeed, the Board itself in the *Briggs* case stated that in some contexts the term employee:

> "in its limited sense may include only the employees of a particular employer as, for example, in Section 8(5) which requires the employee to "bargain collectively" only with the representatives of *his* employees, subject to the provisions of Section 9(a)."

Briggs itself, then is authority for Respondents' position on the issue in this case, that the term employee is to be narrowly defined when it refers to the duty to bargain. Put another way, the Board itself long ago ruled that the term "employee" is *not* to be broadly defined where the mandatory duty to bargain is involved; the broad definition

for which *Briggs* is cited applies in fact only to cases of unlawful termination of an employee and so forms no precedent here.

F. 1935 Act Limits Term Employee To Individual In Work Relationship.

The legislative history of the 1935 Wagner Act makes the limited legislative intent perfectly clear. The original bill (S. 1958) was introduced by Senator Robert Wagner (D. NY). At the hearings, witness Harry G. Eldard *(1 Legislative History of NLRA, 1883)* stated that (in connection with the Section 2(3) definition of employee then proposed):

> "We are going far afield when we say an employee retains that status when he is away from his work."

The Committee Chairman (Sen. David Walsh, D-Mass.) replied:

> "I think it is meant to include an employee who is discharged from being a member of a union that his employer does not approve of . . ."

Senator Wagner then chimed in, as the author of the bill:

> "The unfair labor practices are enumerated and if he (the employee) leaves because those practices are indulged in . . . he has a right to establish that fact, and if he cannot establish that fact, he ceases to be an employee because he left without justification."

Senate Report 573, which accompanied the presentation of S. 1958, at p. 6 fully explains what was in fact the only reason Congress had in stating that the term "employee" "shall not be limited to employees of a particular employer."

> "The term "employee" is not limited to the employees of a particular employer. The reasons for this are as follows: Under modern conditions employees at times organize along craft or industrial lines and form labor organizations that extend be-

yond the limits of a single-employer unit. These organizations at times make agreements or bargain collectively with employers, or with an association of employers. Through such business dealings, employees are at times brought into an economic relationship with employers who are not their employers. In the course of this relationship, controversies involving unfair labor practices may arise. If this bill did not permit the Government to exercise complete jurisdiction over such controversies (arising from unfair labor practices), the Government would be rendered partially powerless, and could not act to promote peace in those very wide-spread controversies where the establishment of peace is most essential to the public welfare.

"The term "employee" also includes an individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice, who has not attained any other regular or substantially equivalent employment. The bill thus observes the principle that men do not lose their right only to be considered as employees for the purposes of this bill merely by collectively refraining from work during the course of a labor controversy. Recognition that strikers may retain their status as employees has frequently occurred in judicial decisions. (See, for example, *Michaelson* v. *United States* (291 Fed. 940), reversed on other grounds in 266 U. S. 42.) To hold otherwise for the purposes of this bill would be to withdraw the Government from the field at the very point where the process of collective bargaining has reached a critical stage and where the general public interest has mounted to its highest point. And to hold that a worker who because of an unfair labor practice has been discharged or locked out or gone on strike is no longer an employee, would be to give legal sanction to an illegal act and to deny redress to the individual injured thereby."

It will be noted that Congress made two main points. First, the only reason given for expanding the concept of "employee" beyond its usual meaning in Section 2(3) was that organizations of *workers* sometimes extend beyond

the limits of a single employer, and collective bargaining sometimes occurs on a multi-employer basis on behalf of several groups of employees. Only for this reason, and to enable the Board to help prevent unfair labor practices where "employees are at times brought into economic relationship with employers" not their own was the qualifying phrase inserted. And, it is clear and obvious, the necessary concomitant of such a concept is in fact the existence of an employment relationship in the first place *at the time of the incident.* As already pointed out, this is hardly the sort of relationship that would encompass retirement status.

Secondly, the original 1935 bill (S. 2926) excluded from its purview the employees of small employers with under 10 people. This original exclusion was dropped in S. 1958 as reported for the reasons set forth in Senate Report 573, as follows:

> "The rights of employees should not be denied because of the size of the plant *in which they work.* And in cases where organization of workers is along craft or industrial lines, very large associations of workers fraught with great public significance may exist although all the members thereof may work in very small establishments."

Here again, it is crystal clear that Congress was thinking of an employee in the sense of a worker, not one who is retired from that status, or a former worker. As Senator Wagner said in the debates (*2 Leg. History NLRA,* p. 2400):

> "Of course the decisions of the courts, so far as I know, have generally regarded *workers* as employees even though they may be on strike." (Emphasis supplied)

Following such statement, Senators Hastings and Wagner discussed whether employees should have the rights granted them by Section 7 of the Act and exercise them *during working hours.* Senator Wagner eventually agreed that employees who did "these things" while they were working would be "subject to discharge" without fear of unfair labor practice limitations.

Here again, the whole thrust of the thinking of Congress is on the employee as a *worker*. Senator Wagner said (*1 Leg. History NLRA* p. 2336) that

> "The right of *workers* to bargain collectively through representatives of his own choosing must be matched by the correlative duty of employers to recognize and deal in good faith with these representatives." "Collective bargaining is the making of agreements to stabilize employment conditions and promote fair *working* standards." (Emphasis supplied)

The journey in the House of Representatives of a companion bill to Senator Wagner's followed much the same line as S. 1958 as the Senate. House Report No. 969 on H. R. 7978 (*1 Leg. History NLRA,* p. 2917) said that the

> "Section 2 definitions are for the most part self-explanatory. [They were the same in S. 1958 as in H. R. 7978.] The committee wishes to emphasize the need for the recognition as expressed in subsections 3 and 9, that disputes may arise regardless of whether disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer."

The House, just as the Senate, used the terms workers and employees interchangeably.

It is thus amply clear that the term "employee" established in the original Act of 1935 meant "worker," and, when broadened beyond a worker for one employer, meant only a worker whose employer and union were linked for bargaining with other employers and union units. It did not even once enter the head of any Congressional representative that the term would ever conceivably include someone not a worker at all.

Both Senate and House actions clearly show what Congress meant to include in its definition of the term "employee." It quite plainly did not have in mind defining the term so as to embrace a non-employee with the single

exception being where (as explicitly provided in Section 2(3)) such a person's employee status was precluded or terminated due to an unfair labor practice. The term "employee" cannot possibly include one who has been severed from employment legitimately and not in violation of the Act, and no amount of sophistic argument is going to alter the plain meaning of words. In addition to other citations, see for example *Homer Gregory,* 123 NLRB 1842 (1959) holding an employee who had quit his job not to be an employee. See also *Westinghouse Air Brake Corp.,* 119 NLRB 1391 (1958).

In other words, as the Trial Examiner below said in his dismissal of the complaint:

> "such instances of employees remaining in the unit while not actually employed therein . . . contemplate not only a continuation of the employer-employee relationship but also a resumption of or return to work in the predictable future."

G. Including Retirees As Employees Violates Basic Purpose of the Act.

Plainly, an assertion that retired persons still remain employees under the Act comports in no way with its basic purposes. The Congressional policy in the preamble to the LMRA of 1947 declares it to be the policy of the United States to protect the exercise by *"workers"* of full freedom of association, self-organization and bargaining. *"Workers"* are to be given the right to designate (for purposes of the Act) representatives of their own choosing.

The fact is that retirees are not *"workers"*. They are wholly out of the labor market and are not seeking jobs. One of the purposes of their retirement, indeed, is to avoid imposing on them the necessity of competing in any labor market in order to achieve an income on which to live. Retirees have no longer any interest in the terms and conditions of employment that obtain at their former place of employment. They are not on the payroll. They are no longer concerned in the shop issues that involve

their former colleagues who remain employees. They have no regular access to the plant, nor any hope of recall. They have no active interest in union affairs and, indeed, are not even accorded a voice in any union decisions (including the question of ratification of the collective contract). The *amicus curiae* brief of the UAW below concedes to be true that in many unions they have merely honorary, non-voting status. They do not participate or vote in union matters, any more than they participate in or are affected by changing working conditions on the work floor, or by an increase in wages or other on-the-job benefits.

There is no effect on commerce of what retirees do when retired. They cannot possibly be said to burden or obstruct commerce. They no longer need the protection of collective bargaining which does not even pertain to or interest them any more. Indeed, for them, the collective bargain has long ago been made. They are now enjoying its fruits, and are protected by the contract which, as to them, arose out of the bargaining but which no longer is subject thereto. The retirees are isolated from the mainstream of interstate commerce and far from the needs of collective bargaining. They are no longer employees; indeed, such non-employee status is implicit in their very nomenclature.

The requirement of bargaining with retirees, then, would hardly add to the expressed purposes of the Act or promote industrial peace because such bargaining, or failure thereof, imposes not the slightest burden or obstruction on commerce. The protection of retirees so ardently espoused by the Board will stem not from bargaining, but from the contractual arrangements made for them when they were in employee status in anticipation of retirement therefrom. Whether or not it is wise to reconvert them into employees, as a matter of social philosophy, so that they can enjoy alleged additional protection through union organization is not a matter for administrative or juristic interpretation of the Act. It cannot be said, as the Board's brief to this Court states (page 31), that bargaining is more "meaningful" with respect to retirees' benefits. The Board

does not anywhere specify what it means by that term which must be viewed as a mere precatory generality without substance of any sort, and certainly not a legal concept that could persuade this Court. It is a matter that is and should be left up to the Congress which is charged with the determination of such matters, and which has already expressed its displeasure at any efforts to expand the terms of the Act beyond what Congress clearly intended. Only in that way can a full and complete record be established on the basis of which action could be taken. And it can readily be stated that the record is far from one-sided on the social question.

It is true that both the Board and various *amici curiae* have expressed themselves vigorously on the desirability of including retirees within the term "employee" by misuse of administrative fiat. It may be questioned whether the interest of such advocators are fully outlined therein, or whether they would have done better to admit that a major consideration in their thinking is the expansion of union power. Indeed, there have been recent instances where the retention of retirees as union members through enforced subservience *via* welfare payments has served to perpetuate in power a union governing hierarchy that has lost touch with its active employee members; does not represent them; yet cannot be ousted because of the voting strength of retirees. There is grounds for suspicion that recent union elections in the United Mine Workers concluded as they did in favor of the union establishment solely because of the fact that retirees were permitted to vote.

Instances of such conflicting interest between employees and this category of non-employees could be proliferated. Many of them were set forth in Member Zagoria's dissent and in the Trial Examiner's decision *supra*. Other detrimental social consequences of the Board's action were reviewed and set forth by the Court below, in stating that the Board has no warrant to "artificially create or manufacture new economic forces." 147 Fed. 2d at 949. The net effect of these instances shows that arbitrary judicial and/or administrative inclusion of retirees within

the scope of the term "employee" would actually serve to frustrate the laudable purposes of the Act, not advance them. Retirees, then, have little if anything in common with active workers under Board policies which exclude them from the scope of any appropriate unit established by it for bargaining and deny them the right to vote in any representation election it conducts. *Public Service of New Jersey, supra.* How the Board can carry water on both shoulders by insisting that retireees are employees on one hand while denying them the substantial rights accorded all other employees by the Act on the other, remains a total mystery. Yet it was and is the *workers* whom Congress has sought to protect with regard to these rights. They are the ones whose fate affects commerce.

Summarizing, retirees' status does not affect commerce with respect to the establishment of any terms and conditions of employment whatsoever. Retirees do not "depress" wage rates; they receive no wages. They cannot cause or be subject to any diminution in employment; they are not employed. They have no interest whatsoever in such common in-shop matters as seniority systems, work assignment policies, incentive rates, overtime handling, job change or establishment, holiday or vacation benefits, plant safety, foremen working, and a host of other matters which customarily comprise the bulk of the typical labor contract. They do not go on strike; they are not working. Their pension benefits are fixed and unchangeable by contract at the time they retire and, indeed, are technically paid not by their former employer but by trustees or insurance companies with whom the employer has made arrangements for such payments.

Retirees have so little in common with active employees that it is a sheer travesty to label them as in the same category. They have absolutely none of the typical indicia of employee status. Their status is so markedly different from employees that no reasonable individual could possibly so consider them. Bargaining on their behalf (if that

is indeed what the unions want to do) can have no effect on commerce whatever. It can cause no industrial strife or unrest whatever because no strike of retirees is possible. They are completely out of the labor market, not to mention the bargaining unit they once were members of.

There is so tenuous a connection at best, through the receipt of certain benefits, that this Court is not warranted in escalating it into employee status. They have no need of protection; their contract for retirement benefits, for which they have already bargained, assures them of that. They can have no employee status; part of the bargain previously made on their behalf is their departure from their former bargaining unit and their relinquishment of employee status in exchange for certain benefits. What they do or do not do thereafter has not even the remotest effect on commerce, and there is accordingly no statutory policy which would justify court or Board-ordered resumption of employee status, certainly not on the basis of changing or misreading the plain words of the English language, as is here attempted. In short, retirees are, by prearrangement, departed from, not a part of, the labor market and cannot possibly claim to be part of it on the mere basis of receipt of certain benefits which are in reality nothing but the consideration for their staying out of the labor market.

It is thus clear that retirees are not employees as that term is used in the law. They are given no rights under Section 7 of the Act, and cannot claim the protection thereof. Nor is there any obligation on the part of their former employer, with whom they now have a wholly different relationship than that of employee, to bargain with any purported representative of such non-employees. Neither the language; the policy; or the intent of the Act commands it, and it is not for the NLRB or the courts to read into the law what Congress has explicitly said should not be there.

III. There Is No Evidence That Practice In Industry Generally or Otherwise Is To Bargain On Retired Employee Benefits.

It is the normal custom for the NLRB as the agency charged with administration of the Act, to rule in any given instance on the basis of record evidence. Therefore, in the light of the Board's efforts to enlarge the scope of the Act, in respect to the type of individuals subject to its jurisdiction, it might have been thought that a major portion of the Board's case would at least have been supported by factual record evidence.

No such assumption could possibly be made with regard to the conclusion of the Board that (177 NLRB #114):

> "Many employers and unions now bargain about pension and benefits for retired employees, reflecting a widespread understanding of the law shared in industrial circles and among members of the labor relations bar."

The Board supports that astonishing assertion in two ways, neither of them factual in any sense whatsoever.

First, it merely cites two arbitration decisions, one by Professor Archibald Cox, *United Drill & Tool Corp.*, 28 L. A. 677 (1957), the other by Arbitrator Sam Kagel in *Pacific Maritime Ass'n.*, 28 L. A. 600 (1957). Neither of them furnishes the slightest scrap of buttressing or support for the conclusion it draws.

Professor Cox's award was merely an interpretation, in a grievance arbitration, of a contract clause. The issue did not involve any refusal to bargain or any other unfair labor practice whatever under the LMRA, but simply a question as to whether *one employer* and *one union* had in fact so conducted their contract negotiations as to agree on a clause therein which covered retirees. It should be noted that Arbitrator Cox was clothed with no more than the usual

arbitral authority to interpret and apply the contract before him, not to fashion a new agreement and certainly not to rule on the question of whether or not unfair labor practices had been committed. He was given no mandate or commission to ascertain whether or not the practice in industry was or was not to bargain on such a question. It was noted in passing, and as dicta to the award, that there had been some bargaining in some industries on this question, but this itself was not supported by record evidence and cannot be used as substitute therefor by the Board. Certainly Professor Cox did not so rule. The main point of the award, moreover, is studiously and carefully ignored by the Board, because it reflects Professor Cox's view that, in such cases as this, involving retirees,

> "*The absence of a statutory duty to bargain* is not enough to invalidate [employer's] promise."

Cox also states therein that even common practice can hardly change the law, a point also studiously ignored by the Board in its anxiety to change it.

The Cox award, then, is not only no authority or warrant for the Board's conclusion, but it actually flatly contradicts and denies the Board's major premise in this case; that there is a statutory duty to bargain over retirees' benefits. Professor Cox himself is authority for the proposition that industry practice cannot bring about the existence of a statutory duty not found in the law; and also that such statutory duty may very well not exist at all. Nor can he be said to rule that industry generally bargains over retirees; his award is very limited and non-factual in that area.

The other award cited by the Board involves not even a matter of contract interpretation, let alone any question of mandatory bargaining, but merely the size of an employer's contribution to a welfare fund, which in fact existed for providing life insurance for both active and retired "men" (not "employees"). It cites no practice, makes no claim

or reference of any kind towards mandatory bargaining, and cannot possibly stand as support for the Board's conclusion.

These two arbitration awards are the main basis used by the Board for its conclusion as to industrial practice. This maneuver in itself would shock one's legal conscience. But, since these cases are readily eliminated as a *valid* basis of support for the Board ruling, the conclusion must necessarily fall, unless some other valid prop for it appears. *There is concededly not one shred of record testimony or evidence on which the Board conclusion upholding retiree bargaining is based.* No one on either side adduced any facts whatever to shore up the Board's conclusion; it follows that it must be withdrawn from consideration by this Court as a matter of law because the mere assertion is not a finding but a mere claim without proof or factual underpinning. Where such claim by the Board becomes a substantial factor in the rendering of its ruling, the only possible action by this Court should be a dismissal on the record as a whole because of utter lack of evidence on such a major point.

It is, of course, true that some of the *amicus curiae* briefs below alleged "many instances in which bargained increases in benefits have been obtained for retired workers." These statements, too, remain mere assertions, unproven and unprovable; they should not have been even considered in reaching a decision below for that reason alone. It is hardly an appropriate or useful means of policy-making to depend on such self-serving documents, and the outcome is hardly worthy of the standards which we have a right to expect from a government agency charged with so delicate and complex a task as administering national labor policy.

Indeed, the folly of relying on not-disinterested *amicus curiae* briefs to supply the facts that the record evidence does not do is evident from the considerable stress laid in such briefs to the Board on the supposition that General Electric Corporation bargained in fact over retired em-

ployee benefits. Yet General Electric itself flatly contradicted such claims in a letter to the Board which wrung an unwilling apology for its error from the most flagrantly mis-stated *amicus curiae* briefs.

The other sources cited in support of the Board's conclusion basically do not stand for the proposition that there is a general practice of bargaining, mandatory or otherwise, *over changes in retired employees' benefits,* but merely show (even if taken at face value) that there have been changs in such benefits from time to time after certain individuals have retired. This is really characterized by the Board, not as a practice in support of mandatory bargaining, but merely as "showing a broad potential need for union bargaining with regard to" retirees. Assuming the existence of a need, it does not warrant changing the law by administrative fiat. This argument should be addressed to Congress, not to the adjudicative bodies.

Indeed, much of the so-called practice of bargaining over retirees' benefits is actually not that at all but merely normal routine bargaining over changes in such benefits for employees *currently on the payroll in the appropriate unit.* The very considerable confusion on this point has obviously been fostered by the Board and the *amicus curiae* as a means of shortcutting normal procedures of securing evidence.

Surely no one can be allowed to ignore so fundamental a bastion of our current legal system as the requirement of record evidence to support a result in favor of a dubious expediency. If the proposition the Board here seeks to establish in fact is valid, no need for such rejection of long-term legal standards would be necessary. The absence of adherence to them bespeaks a rickety structure which should not be allowed to endanger its supposed beneficiaries.

Moreover, the alleged practice is not as widespread as alleged. General Electric has validly and without dispute disclaimed adherence to any such practice. Union Carbide

does not bargain for retirees and has not ever done so. Other chemical companies do not bargain with their unions for retirees or over retiree benefits. Numerous other companies in a broad cross-section of American industry do not bargain for retirees. The practice is, if it indeed exists, far more scanty than assumed by proponents of its expansion; indeed, perhaps for that reason the Board merely cited a "need for bargaining" in this area. But to cite a need for a particular practice is also to cite its current absence.

A need, then, is not a practice but the very antithesis thereof. And a practice does not change the law. The fact that many people may violate traffic laws does not render them automatically invalid; such a proposition would have appeared too elementary to have even required restating. But the Board evidently thinks otherwise; even though by seeking to establish such a proposition it also is establishing a two-edged sword. It is all well and good to cite a "practice" in order to *extend* the law; but then it should be equally well and good to cite a practice as warranting *invalidation* of an existing law, however desirable. No one has seriously contended for such a principle; yet it stands on no worse a footing than that for which the Board contends. Laws are passed or repealed by legislatures, not by adding up the sum of popular practices, in the last analysis.

It is clear, therefore, that the practice of bargaining over retiree benefits has not one scintilla of evidential support in the record and so, as a matter of law, cannot be considered as any basis for the Board's position. Yet its posture contains clear indication that the Board relied heavily on what necessarily must remain a mere non-factual claim. The so-called practice cannot even be discerned from the matter alleged in the sole source of such allegations, the *amicus curiae* briefs. There is, also, substantial contrary evidence available that the so-called practice is far from being as widespread as claimed. Moreover, the two arbi-

tration awards cited are no support at all for the Board's conclusion. And, finally, even assuming what is obviously not the case, that a practice exists, such practice cannot expand the scope of the NLRA, or serve to revise the definition of "employee" therein. As the Court below states, it forms no basis for changing the Act.

Conclusion

For the reasons set forth above, Union Carbide Corporation, as *amicus curiae,* respectfully urges that the petition for review of the Court's order below be denied.

Respectfully submitted,

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicity states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9(a);

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultane-

ously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of Section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

* * *

SEC. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

Relevant provisions of Title III of the Labor Management Relations Act, 29 U. S. C. 186, are as follows:

SECTION 302(c). The provisions of this section shall not be applicable

* * *

(5) with respect to money or other thing of value paid to a trust fund established by such representa-

tive, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose

of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training program: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.[1]

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[1] Section 302 (c) (6) was added by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 537, 539, to remove doubts theretofore existing as to apprenticeship and training programs and as to vacation, holiday, severance or similar benefits. H. Rep. No. 741, 86th Cong. 1st Sess., pp. 46-47, II Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, Washington, 1959, pp. 804-805.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 819

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1, *Petitioner,*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL., *Respondents.*

No. 961

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE BY THE CHAMBER OF COMMERCE OF THE UNITED STATES

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On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE BY THE CHAMBER OF COMMERCE OF THE UNITED STATES

I.

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States files this brief, *amicus curiae,* to present its views on a case of great importance in the administration of the National Labor Relations Act.[1]

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[1] This brief is filed with the written consent of all parties in accordance with Rule 42(2) of this Court.

The National Chamber is a business federation with a membership of more than 3,800 state and local chambers of commerce and trade associations, and with an underlying membership of more than 5 million individual businessmen and business firms, a substantial number of which are engaged in commerce and subject to the National Labor Relations Act.

Many of these firms deal with various international and local unions as representatives of their employees in bargaining units established under the Act. Many have pension plans and other programs which provide benefits to persons who have retired from employment. In addition, such firms have numerous other relationships which, under the contentions of the Board and the *amici* unions, would be within the scope of collective bargaining.

The preservation of free collective bargaining from such unwarranted Government intrusion is a matter of vital continuing concern to the Chamber. For example, the Chamber recently appeared, as *amicus curiae,* in urging this Court that the National Labor Relations Board could not undermine this fundamental principle by ordering agreement to a substantive term of a collective bargaining agreement (*H. K. Porter Company, Inc.* v. *N.L.R.B.,* 397 U.S. 99 (1970)) and that, in order to foster voluntary collective bargaining, equitable relief should be available to compel compliance with agreements freely made. (*Boys Market, Inc.* v. *Retail Clerks, Local 770,* 398 U.S. 235 (1970)). The Chamber has a similar interest in this case and believes its views and experience may again be of assistance to the Court.

• (*Boys Market, Inc.* v. *Retail Clerks, Local 770,* 398 U.S. 235 (1970)).

II.

SUMMARY OF ARGUMENT

The Board's position violates basic statutory principles and seriously misconstrues the bargaining process.

First, the Board's argument that retired employees are now to be considered "employees" whom the Union may represent in collective bargaining with their former employer, significantly erodes the unit concept of bargaining firmly implanted in the Act. As this Court noted in *U.M.W.* v. *Pennington,* 381 U.S. 657, 666 (1965), bargaining is required only on a "unit by unit" basis. Under the Board's interpretation of the Act in this case, however, an employer will not simply be required to bargain with respect to its employees in an appropriate unit, but will also be subject to a mandatory obligation to bargain about "employees" not on its payroll, "employees" it can direct to perform no work, "employees" it can neither fire nor discipline—"employees" who are, in fact, not employees.

Second, the Board's independent and alternative argument that an employer must bargain over anything which "vitally affects" bargaining unit employees or the funds available for them, would logically appear to extend an employer's obligation to bargain about such fundamental and heretofore reserved decisions of management as whether to build a plant, to buy equipment, to mount an advertising campaign or to declare a dividend. These basic decisions are only a few of those which will necessarily limit the funds available for active unit employees and "affect their vital

interests."[2] Under the theory that an employer must bargain about any item which "vitally affects" unit employees, a union, once established as the exclusive representative of any specific employee unit, can enlarge the scope of its bargaining to include classes of employees or persons outside the confines of the unit which it represents, so long as it might appear that the wage or benefits of such outside groups "affect" unit employees. This theory represents a further and substantial step in the direction of discarding "unit bargaining" in favor of a broad concept of "interest" bargaining which has no apparent limitation and which will permit a union to bargain about any conceivable matter it deems of "interest" to itself as a labor organization.

Finally, we submit that the instant case presents this Court with an opportunity to establish clear and definitive guidelines regarding the mandatory bargaining obligation of employers and unions, so that they may both henceforth clearly understand their bargaining obligations under the Act.

Indeed, the Board's position, which radically alters the framework in which collective bargaining has heretofore been conducted, is evidence of the damage re-

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[2] In its brief to this Court, the Board suggested that "employers normally regard retirees' benefits as part of their labor costs, so that these costs have a direct, and not merely an oblique effect upon the benefits of active unit employees." (p. 19). The internal accounting procedure of corporations may differ widely according to business practice and custom in each corporation. Whether accounting methods and sound tax administration require that an expenditure of funds be designated in one or another way, is immaterial. Ultimately, all employee benefits, as well as such expenses as advertising, maintenance, or depreciation, are part of the cost of doing business.

sulting from the absence of clear guidelines. For, only in the absence of guidelines could the Board have rendered this decision—a decision which, by requiring an employer to bargain about the settled benefits of retired employees, creates far-reaching new limits for the bargaining obligation.

III.

ARGUMENT

A. RETIRED EMPLOYEES ARE NOT EMPLOYEES OF THE COMPANY FROM WHICH THEY HAVE RETIRED FOR THE PURPOSES OF COLLECTIVE BARGAINING

1. The Board's Reasoning That Retired Individuals Are "Employees" Within the Meaning of Sec. 8(a)(5) Is Without Foundation in Law

The Board offered two reasons in support of its finding that the term "employee" in § 8(a)(5) should include retirees. Neither has merit.

(1) The Board reasoned that the term "employee" has the same meaning in Section 8(a)(5) as in Section 302(c) of the Act and Sections 401(a) and 501(c) of the Internal Revenue Code of 1954. Section 302(c) and the Revenue Code provisions, however, serve needs far different from those served by Section 8(a)(5). Section 302(c) is a criminal provision designed to protect the interests of beneficiaries; the Revenue Code provisions condemn the improper use of pension funds as a tax avoidance technique. Neither provision is, like Section 8(a)(5), intended to deal with employer unfair labor practices. The Board has drawn a dangerously over-simplified analogy in trying to import the meaning of the word "employee" from inappropriate statutory sources into the unfair labor practice section of the Labor Act.

(2) Finally, the Board justified a broad definition of "employee" by comparing that term to the term "employment," as used in Section 8(a)(3) of the Act. The Court below easily disposed of this argument in these words:

> "If prospective employees or those whose employment has ceased because of illegal discrimination are not regarded as within . . . [the] terms [of § 8(a)(3)], refusal to hire for unlawful reasons, and unlawful discharge, could never be unfair labor practices under this section."[3] (A. 12-13).[4]

The Board's attempt to "prove" that former employees remain employees of their former employer is self-defeating. Upon retirement these individuals are removed from the payroll. They retain no connection with their former employer; they perform no work, receive no pay and have no expectation of reemploy-

---

[3] The Board has also in other contexts recognized the necessary distinction between the use of the word "employees" in § 8(a)(5) and the use of the term "employment" in § 8(a)(3). In *Page Aircraft Maintenance Inc.*, 123 NLRB 159, 163 (1959), the Board pointed out that:

> We do not regard as controlling for purposes of determining for whom an employer must bargain those cases cited . . . which hold that the anti-discrimination provisions of section 8(a)(3), (4) and (b)(2) of the Act forbid discrimination against applicants for employment. The anti-discrimination provisions refer to "employees" *generally*, whereas unlike these provisions, section 8(a)(5) contains specific language requiring an employer to bargain for *"his" employees*. (Emphasis in original).

[4] Citations to the record refer to "Appendix to Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit" in *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, October Term, 1970, No. 910.

ment. Under these circumstances, it is inconceivable that they could continue to be considered employees of the employer from whom they have permanently retired.

2. By Extending a Union's Representational Rights to Former Employees the Board Has Vitiated the Concept of Unit Bargaining

The Board urges a principle which would destroy the concept of unit bargaining and elastically extend the bargaining obligation of employers. For the theory that an individual who retains "a substantial connection to the bargaining unit" (A. 37) is an employee whom a union may represent in dealing with an employer could apply not only to retired employees, but also with equal force to other categories of non-unit individuals:

> (1) A former employee whose employment terminated because of a work-related disability. A person for whom an employer has contributed premiums for Workmen's Compensation insurance has as substantial a "connection to the bargaining unit" as a pensioned employee. Like a pensioned employee, an employee on Workmen's Compensation retains an interest in protecting or upgrading his insurance benefits.
>
> (2) An employee whose employment has terminated before retirement but who retains a vested interest in a company pension plan has a connection to the bargaining unit equal to that of retired employees. He also is a former employee with a substantial interest in his earned pension benefits.
>
> (3) Non-union supervisors and salaried employees, whose benefits are closely tied to those contained in a collective bargaining agreement, also have a substantial connection to the bargaining unit.

(4) Simliarly, employees at other facilities of the employer may have a connection to the bargaining unit, if they manufacture the same product, receive wages from the same source of funds or enjoy the same or nearly equivalent benefits.

These examples are not exhaustive; they merely illustrate the predictable consequences of the Board's extension of the term "employee" to encompass former or retired employees. Of perhaps greater concern than the probable extension of the bargaining obligation as a result of this decision to various groups of non-employees, is the almost certain breakdown of collective bargaining as a consequence of this extension. For example, a union representing retirees or other categories of non-employees could strike to enforce the demands of these non-employees. Thus, former or other groups of non-employees with little, if any, economic interest in the employer, could cripple its business operation. Moreover, no employer could ever hope to stabilize his legal commitments to retirees, or to predict the value of the services they had rendered when employed, since his duty to periodically renew retiree benefits will be perpetual. The Board's view, instead of promoting stable bargaining relationships, introduces into collective bargaining an entirely new dimension of instability and chaos—to the detriment of employees, employers and retired individuals.

B. AN EMPLOYER IS NOT OBLIGATED TO BARGAIN OVER THE BENEFITS OF RETIRED EMPLOYEES ON THE GROUND THAT THESE BENEFITS VITALLY AFFECT BARGAINING UNIT EMPLOYEES

The second ground upon which the Board rested its conclusion that the Employer must bargain about the benefits of retired employees—that these benefits "vitally affect" the interests of unit employees—has

not been supported by any dispositive reason in law. Indeed, the Board offered only unrelated and disconnected items of dicta to "prove" that the benefits of retired employees vitally affect the interests of active employees. Thus, the Board suggested that since active employees have an interest in retirement benefits, as well as an interest in the solvency and the administrative regularity of the retirement fund, they are vitally affected by negotiations dealing with the secured benefits of retired employees.

In the first place, however, Congress has expressly dealt with the administration of retirement trusts. The argument of the Board (see Board Brief, pp. 18-19) that disputes arising out of a breach of a pension plan are "better settled through collective bargaining than through litigation," overlooks the salient fact that Congress has seen fit to provide retirees with an *orderly* method of remedying a breach of a retirement plan trust under Section 301 of the Act as well as recourse to the courts for equitable relief. See *Blankenship* v. *Boyle, et al* (Judge Gissell's opinion) —— F. Supp. —— (U.S. D.C. D.C., 1971) 77 LRRM 2141. To introduce—in place of this Congressionally approved process for the orderly determination of pension disputes—a requirement that an employer must bargain about and on behalf of "strangers" whose employment status is non-existent will not lead to the peaceful and orderly settlement of disputes, but only to confusion and chaos. As noted, this requirement will, for the first time, impose mandatory bargaining over demands made by strangers who have little, or no, interest in the employer, but who might well have the ability to disrupt the employer's operation. They would certainly not be subject to the same economic deterrent as

active employees to refrain from disruptive activities. Secondly, a union's enforceable demand to upgrade pension benefits of retired employees destroys the ability of a company to finalize *current* wage costs, the same as if a union could require an employer to renegotiate and retroactively adjust past wages for services previously rendered. As board member Zagoria said in his dissenting opinion:

> "An oft-cited advantage of collective bargaining is that it results in a specific agreement satisfactory to both sides setting out a firm package of benefits for a fixed period. The company can base its prices and general business policy on this and workers can insist on exact payment of the agreed upon benefits. If mandatory bargaining is required, either party years later can reopen the agreement and unravel the provisions. Moreover, this is a two-way street, and not only upward. Thus, if the union may require bargaining over increases, could the employer not insist on decreases?" (A. 53).

Finally, as the Court below noted, active unit "employees are concerned about their own benefits." (A. 17). To contend that active unit employees and retirees share an interest in the administration of trust funds and in the upgrading of retirees' benefits is to ignore the plain fact that the interests of active employees and retired employees in retirement benefits are frequently not complimentary, but diametrically opposed. To increase retired employee benefits is to reduce funds available for active employee benefits. The converse is also true. While we do not suggest that active employees would inevitably act in opposition to the interests of retired employees, we do suggest that the Board, by establishing a *structure* which would

institutionalize the contrary interest of pensioners and active employees in the disposition of funds available for wages and employee benefit programs, would greatly enhance the potentiality conflict.[5]

C. THE BOARD HAS MISCONSTRUED THE CONTROLLING DECISIONS OF THIS COURT

The extended view of the mandatory duty of bargaining the Board has propounded and the Petitioner and the Union *amici* promote, results from a misunderstanding of the rule of this Court set forth in *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964) and in *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959). A close analysis of these precedents clearly establishes that they not only fail to support the position of the Board and the unions, but, to the contrary, lend weight to the decision of the Court below.

Fibreboard and *Oliver* cannot be construed to require an employer to bargain about *any* matter which affects active unit employees. In *Oliver*, this Court said that a provision of a collective bargaining agreement for a unit of truck drivers which regulated truck rental the company paid to independent drivers, did not violate Ohio's anti-trust law, as such rental was a mandatory subject of bargaining.

The Court found that:

> "... *an inadequate rental might mean the progressive curtailment of jobs through withdrawal of*

[5] This fear that active employees would seek to advance their own interests at the expense of retirees is not dispelled by the fact that a few employers and unions have voluntarily negotiated increased retiree benefits; for under permissive bargaining, a company would not be required, as under mandatory bargaining, to bargain over a demand to *reduce* retired employee benefits.

more and more carrier owned vehicles from service." (Emphasis added). 358 U.S. 283, 294.

The truck rental provision was considered a mandatory subject of bargaining because and only because it protected jobs by foreclosing the contracting out of trucking services.

Similarly, in *Fibreboard* this Court carefully limited its ruling to read that, "replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under Section 8(d)." 379 U.S. 203, 215.

Thus, in both *Oliver* and *Fibreboard,* the Court dealt with *the* basic interest of employees: the existence of jobs. Concededly, in many circumstances, employer action to displace or eliminate unit jobs through subcontracting is subject to collective bargaining; but elimination of jobs is not comparable to employer action which affects only *former employees* and which has no affect on unit jobs or the job security of active employees. To extend by tenuous analogy the *Oliver* and *Fibreboard* doctrine, which requires bargaining only over action affecting the very *existence of jobs*—the fundamental expression of "wages, hours and terms and conditions of employment"—to a case involving the pension benefits of non-employees, twists the doctrine of requiring bargaining over the curtailment of jobs wholly beyond recognition.

Further, in neither *Fibreboard* nor *Oliver* did the Court uphold the right of the bargaining representatives of the unit to bargain about wages, benefits, or conditions *on behalf of* the subcontractors' employees or any other employees or persons outside the unit.

D. THE BOARD, PETITIONER UNION, AND UNION AMICI STATEMENTS AS TO INDUSTRIAL PRACTICE ARE NEITHER DEFINITIVE NOR CONCLUSIVE NOR A PART OF THE RECORD IN THE CASE

The Board, Petitioner Union and Union *Amici,* assert that bargaining over retiree benefits is a universal practice throughout industry. Therefore, they contend, a mandatory obligation is created. Not only is this reasoning wholly falacious, evidence to support it is not found in the record. Industry practice was not a subject of inquiry at the evidentiary stage of the Board proceedings. *Ex parte* statements not subject to cross-examination or rebuttal cannot be the basis of a new rule of law, especially where, as here, the rule would drastically alter basic industrial practices in the complex and varied field of collective bargaining.

Furthermore, the information available to the Chamber does not reveal a uniform practice. While some employers voluntarily negotiate benefits for retirees with their unions, others act unilaterally from time to time to improve these benefits. Many employers, as a matter of courtesy or policy, inform the unions of improved retirement benefits; and still others discuss, but do not negotiate, these improvements with the unions.

The Chamber submits, therefore, that voluntary industrial practice, particularly when not fully explored in an evidentiary hearing, can provide little guide for the interpretation of the statutory requirements. As Mr. Justice Stewart pointed out in *Fibreboard,* "the ultimate question is the scope of the duty to bargain defined by the statutory language." 379 U.S. at 220.

IV.

CONCLUSION

The bargaining obligation as defined and developed by the Board and by the Federal courts is not infinitely elastic; it has legal and practical limitations which the Board has stretched totally beyond recognition.

The Chamber submits that the Act cannot be distorted to fit the concept of collective bargaining the Board urges this Court to adopt. For all the foregoing reasons and for the reasons propounded by Respondents, we respectfully urge this Court to affirm the decision of the court below.

Respectfully submitted,

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~~Nos. 810 and 861~~

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1, *Petitioner*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENT PITTSBURGH PLATE GLASS COMPANY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 910

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1, *Petitioner*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL.

No. 961

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENT PITTSBURGH PLATE GLASS COMPANY

STATUTES INVOLVED

The relevant statutory provisions are set forth in the Appendix.

QUESTION PRESENTED

The primary question presented here may be stated as follows:

> Does Section 8(a)(5) of the Act require an employer, as a mandatory bargaining obligation, to negotiate with the union representing his active employees with respect to retirement benefits for persons who have previously retired from his employ?
>
> Subsidiary to this question are the following:
>
> (1) Are retired persons "employees" of this employer after their retirement within the meaning of Section 8(a)(5) and 9(a) of the Act?
>
> (2) Are retired persons properly a part of and included in the appropriate bargaining unit for which bargaining is required by Section 8(a)(5) of the Act?
>
> (3) Can a union selected by and certified to represent the active employees in a defined bargaining group or "unit" also represent retired persons?
>
> (4) Can a union claim the exclusive authority under the Act to bargain for persons who have no voice in the selection or decertification of the union, no voice in internal union decisions, and no voice in the negotiation and ratification of labor agreements?

STATEMENT OF THE CASE

This case arose as a result of events occurring at the Barberton, Ohio, plant of the Company in March 1966.

A. STATEMENT OF FACTS

The Board's statement omits some important facts, and erroneously creates the impression that the Company has since 1950 periodically negotiated benefits or

changes in benefits for persons who had previously retired. This is in error. Except for one occasion in 1964, all benefits negotiated were prospective and applied to active employees to take effect upon their retirement. A brief review is in order.

1. Background of Certification of Unit and Union Status of Retirees

(1) The Union was certified on February 7, 1949, as the representative of employees of the employer at its Barberton, Ohio, plant. The employee unit established by the Board as appropriate for bargaining under Section 9(b) of the Act was described as:

> "All employees of the Employer's plant and limestone mine at Barberton, Ohio, working on hourly rates, including group leaders who work on hourly rates of pay, but excluding salaried employees and supervisors within the meaning of Section 9(b) of the Act . . ." (G. C. Exh. 2; A. 112, 118)

The Union was certified pursuant to an election among the employees in this unit. In this election only employees on the active payroll were eligible to vote. Retired persons were not eligible and did not vote in the election (G. C. Exh. 2; A. 112, 118). In a subsequent election held in November 1970, the Board again excluded retirees. All collective bargaining agreements negotiated since the certification have contained the same unit description (G. C. Exh. 6; A. 89, 121).

(2) Retired persons cannot vote in internal union elections or in the election of union officers or negotiating committees. Nor can they, under the Union's constitution and by-laws, vote on a labor contract ratification. They are only "honorary members" with no participating or voting rights in the union (A. 139-140).

(3) In 1966, there were approximately 190 persons formerly employed at the Barberton plant who were retired and on Company pension (A. 170). Many reside in Ohio, but some live in several other states and some in a foreign country (A. 166). Retired people are not continued on any employer seniority list, and, since the pension plan provides for mandatory retirement at age 65, they have no expectation of re-employment (G.C. Exh. 4; A. 62, 120). Those who retire at an earlier age have no re-employment rights (A. 164). The same is true of those who retire for disability (A. 164-165).

2. Background of Bargaining on Retirement Benefits

From time to time since 1950, the Company and Union have negotiated retirement benefits for the active employees to take effect upon their retirement. The Company maintained throughout, however, that it was not required to renegotiate changes in retiree benefits after retirement.

The Company was willing to consider voluntary improvements in retiree benefits after retirement and, in fact, did so on several occasions.

In 1950, the Company verbally agreed to allow persons who later retired to participate in the medical program (A. 116). In 1954, the Company unilaterally improved the medical benefits for retired employees (A. 151). In 1960, the parties negotiated an upgrading in the medical plan, but the negotiated increase in benefits applied only to persons retiring after the effective date of the agreement (A. 151-152). Then, in 1962, the Company agreed to contribute $2.00 per month toward the cost of medical insurance, but only for employees who retired after June 27, 1962 (A. 118).

In 1964, the Company agreed to increase the $2.00 per month contribution to $4.00 per month, with express understanding that if Medicare were adopted, the contribution would revert to $2.00 per month (G.C. Exh. 5; A. 88, 121). This was the only time an agreement was made that affected benefits of persons already on retirement.

That set the stage for the 1966 events at issue in this case.

3. The Events in 1966

In March 1966, the Company informed the Union that, after extensive study of its medical plan for retirees, it had decided to discontinue the medical insurance plan for retirees because the plan contained non-duplicating features which rendered it valueless in view of Medicare. To assure the continuance of medical benefits, the Company proposed to contribute $3.00 per month for each eligible retiree to cover the cost of Medicare (A. 158-161).

When the Union objected to cancellation of the medical insurance, the Company reconsidered and notified the Union on March 23 that it had decided to leave the medical insurance plan intact. In addition, the Company notified the Union that it intended to offer each retiree the option of continuing under the medical plan or withdrawing and receiving a $3.00 per month contribution to Medicare (A. 177-178).

The Company spokesman called attention to the March 31, 1966, deadline for Medicare enrollment. The Union requested and was furnished a copy of the letter to retirees (A. 178).

Fifteen retirees elected to accept the contribution to Medicare; the others elected to remain under the existing medical plan (A. 146).

The Union filed charges with the NLRB.

B. DECISIONS OF THE TRIAL EXAMINER AND THE BOARD

1. The Trial Examiner's Decision

The Trial Examiner found no violation of the Act and recommended dismissal of the case.

The Examiner found that the retirees were not "employees" and not members of the bargaining unit within the meaning of Section 8(a)(5) and 9(a) of the Act, and held, therefore, that while bargaining for retirees is permissible, it is not mandatory under the Act.

He further found that by providing an option to retirees to exercise as they saw fit, the Company had not unilaterally modified its agreement with the Union within the meaning of Section 8(d) of the Act (A. 9-25).

2. The Board Decision

The Board majority reversed the Examiner. The Board based its reversal on these grounds:

> (1) That retirees are "employees" within the meaning of Section 2(3) of the Act; and,
>
> (2) That, even if retirees are not "employees", there is a mandatory obligation on the employer to bargain retiree benefits because such benefits "vitally affect bargaining unit employees".

The Board accordingly ruled that bargaining with respect to retirees and their benefits was mandatory

under the Act, and that, by granting the Medicare option to the retirees, the Company violated its bargaining obligation under the Act (A. 25-48).

3. The Dissenting Opinion of Member Zagoria

Member Zagoria questioned both the legal basis and the wisdom of the majority opinion.

On the question of legality, he found:

> (1) That since retirees are no longer working for the employer, are not on the payroll, and have no access to the plant or expectation of recall, their status is best described as "pensioners" rather than "employees".
>
> (2) That apart from their lack of employee status, retirees are uniformly excluded from voting in Board elections and are clearly not a part of the bargaining unit; and
>
> (3) That retirees have no vote or voice in the Union and no standing to initiate a decertification petition.

Member Zagoria concluded that, in view of these facts, the Act gave the Union no authority or duty to represent retirees and imposed no obligation on the employer to bargain about them with the Union.

Zagoria expressed concern with the "far reaching implications of the majority decision," pointing out that the Board was "going beyond anything it has said or done in other types of cases."

He further pointed out:

> (1) That in most respects retirees are in no different status than individuals who leave the bar-

gaining unit for other reasons and the scope of the majority ruling was difficult to define and to limit;

(2) That the majority opinion would have an adverse affect on the stability and finality of labor agreements. An oft-cited advantage of collective bargaining, he said, is that it results in a specific agreement setting out a firm package of benefits for a fixed period. This allows employers to base their prices and general business policy on these agreements and the worker to insist on exact payment of the agreed upon wages and benefits. If mandatory renegotiation of agreements is required, either party, years later, could reopen the benefits and "unravel the terms;"

(3) That bargaining is a "two-way street" and retiree benefits could be bargained up or down;

(4) That the majority opinion posed and left unanswered a host of difficult questions, such as the effect of a change in bargaining agent after employees retired from the unit, the problem of conflict of interest and fair representation, the application to retirees of union-security agreements, and the like.

Finally, Member Zagoria referred to representations made to the Board by Union *amici* citing examples of voluntary bargaining for retired workers. He commented that these voluntary arrangements are a "tribute to the humanistic quality of an enlightened labor-management relationship," but that to hold these matters to be the subject of mandatory bargaining was in his judgment beyond the intent of the Statute (A. 48-52).

C. DECISION OF THE COURT BELOW

The court below set aside the Board's order, and later denied a motion for reconsideration, *en banc*. The court held that retirees are not "employees" within the meaning of Section 8(a)(5) and are not members of the unit for bargaining to which the bargaining obligation is limited under the Act. The court further found without foundation in the Statute the Board's alternative argument that, even if not employees, retiree benefits are subject to mandatory bargaining because these benefits "affect active employees."

The Court of Appeals defined the issue as follows:

> "The issue is, once retirement benefits have been negotiated for active employees who have retired and begun collecting benefits, whether an employer may propose improvements in benefits to the retirees individually, or whether retirees are 'employees' under Section 8(a)(5), changes in whose benefits must be collectively bargained with the union." (A. 190-191).

On the "employee" issue, the court found that, while Section 2(3) of the Act defines the term "employee" in general terms, this section also provides that this broad definition shall give way where the Act explicitly provides otherwise. The court then turned to Section 8(a)(5) and found that this section defines the bargaining obligation and limits the employer's obligation to "his employees" and no others. The court commented that as long ago as *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941), this Court recognized the limiting effect of Section 8(a)(5) (A. 191-193).

The court below then considered the various arguments made by the Board for a more expansive definition of "employee" by analogy to cases, statutes, and regulations where the term "employees" had for some

special purposes been defined to include persons no longer serving an employer and found them explained on grounds not applicable to the bargaining obligation (A. 194-195).

The court then examined the evidence in this case and found on the facts that employment with this company was a complete and final severance of employment, and none of the normal and traditional attributes of employment pertained. The court therefore held that the retirees are not employees of this employer for purposes of Section 8(a)(5) (A. 195).

The court further found that Section 8(a)(5) and Section 9(a), read in combination, limit the scope of mandatory bargaining to the bargaining unit, and that pursuant to uniform Board policy retirees had been excluded from the bargaining unit certified by the Board at this plant. Based on these findings, the court held that retirees were not a part of the bargaining unit (A. 195-197).

The court also considered and rejected the Board's alternative argument that, even if retirees are not employees under the Act, their retirement benefits are mandatory subjects of bargaining because their retirement benefits "vitally affect active bargaining unit employees."

The court held that what active employees are legitimately concerned with are their own retirement benefits, and that it is not necessary to extend the bargaining obligation to employees already retired in order to insure active employees the right to negotiate their own retirement benefits and to protect those benefits after retirement (A. 197-199).[1]

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[1] Contractual retirement benefits are enforceable in the courts as the court below found. *Upholsterers' Union* v. *American Pad Co.*, 372 F. 2d 427 (C.A. 6, 1967).

Finally, the court held that the Board's arguments were in defiance of the Act's purpose to reconcile and equalize the power of competing economic forces in order to encourage the making of voluntary agreements and prevent industrial strife. The court found that retired employees, being detached from employment and possessing no vote or influence in the Union have "no economic or bargaining power in this system." The court also expressed the fear of relegating earned retirement benefits to the bargaining process in which the retirees as a group could exert no real economic power (A. 199-200).

The court referred to representations made by the Board and various Union *amici* claiming that bargaining for retirees is a common industry practice. The court found that, while such voluntary arrangements were to be encouraged, they could not supply the basis for altering the statutory language or undermining the congressional intent (A. 200).[2]

SUMMARY OF ARGUMENT

1. The issue in this case does not relate to the proper subjects for bargaining but to proper identification of the unit for which bargaining is authorized and required by the Act. Under Sections 8(a)(5) and 9 of the Act, the union's bargaining authority and the employer's bargaining obligation are limited to the employees of the particular employer who are members of the unit established as appropriate for bargaining

[2] A commentator who reviewed the lower court's ruling concluded that it reached the correct result. Comment, 39 U. Cinn. L. Rev. 573 (1970). Prior to the court's decision, others had questioned the result reached by the Board majority. See Comment, 68 Mich. L. Rev. 757 (1970); Note, *Retirees' Status as "Employees" Under NLRA*, 43 Temple L. Quarterly 373 (1970); Comment, 44 Tulane L. Rev. 605 (1970).

purposes. Since retirees have permanently severed their employment, have no expectations of recall, perform no services and are paid no wages, they are not employees of the employer after their retirement and cease to be members of the bargaining unit. The bargaining unit controls the scope and extent of the bargaining obligation. Therefore, while bargaining over retiree benefits is permissive, it is not mandatory under the Act.

2. The Board's alternative argument that, even if retirees are not employees, the union representing active bargaining unit employees represents and has the exclusive right to compel bargaining for retirees after their retirement finds no sanction in the Act. This unprecedented contention is a threat to the entire bargaining structure enacted by Congress and constitutes a serious inroad upon the bargaining unit concept. It conflicts with the Board's own precedents and those of the courts defining the bargaining obligation.

3. The bargaining unit has incidents which the Board cannot ignore. It not only defines and limits the employee group for whom the employer must bargain; it also defines the limits and extent of the union's authority as bargaining agent. The bargaining unit is the constituency which, under Section 9, elects the bargaining representative for the unit and controls the bargaining policies of the unit representative, including the ratification of labor agreements applicable to the unit. Retirees play no part and have no voice or economic power in this system. The Board has uniformly excluded retirees from bargaining units under Section 9, and in two elections at this very plant has excluded them from the unit and from voting on the selection of the Union as bargaining agent for the unit.

Similarly, retirees are mere "honorary" members of the Union, have no vote or voice in its affairs or in the ratification of agreements. Nonetheless, and paradoxically, the Board seeks to treat them as a captive appendage to the bargaining unit, making them subject to the control of the unit representative but denying them a voice in its selection and in its bargaining policies.

4. The Board has put forth an entirely new concept of "interest" bargaining which has no statutory basis. The Board concedes that the court below was correct in holding that it is not necessary to extend the bargaining obligation to persons already retired in order to insure active employees the right to negotiate their own retirement benefits and negotiate binding commitments that these benefits will in fact be paid. The Board's attempt to justify mandatory bargaining for retirees after their retirement on the ground that their benefits "vitally affect active employees" is unsound and at odds with the statute.

5. The Board's ruling, as Member Zagoria held, has implications which are far-reaching and go beyond the issue of mandatory bargaining for retirees. If given its logical extension, the concept of "interest" bargaining will spawn union claims to mandatory bargaining rights for various classes of persons outside the bargaining unit on the ground that the wages and benefits of such persons affect employer funds available for wages and benefits for unit employees. The concept, therefore, will engender uncertainty, controversy and disputes.

It will also create issues as to the finality and stability of labor agreements, and impose unfair burdens

on employers. This is because it is explicit in the Board's ruling that retirement benefits are subject to repeated compulsory renegotiation long after the employee has retired. As the court below and Member Zagoria found, this view of the bargaining obligation as it applies to retirement benefits will encourage attempts to unravel the terms of the past agreements and the package of benefits with which employees retire and thus subject the employer to repetitive demands for retroactive renegotiation of the value of past employee services, which had been the subject of mutual agreement before the employee retired. The employer cannot retroactively adjust his prices to meet this obligation which would be interminable and open-ended.

6. The Board and Union *amici* place great stress on representations that bargaining for retirees is a common industry practice. Employer *amici* challenge the universality or generality of the alleged practice. The court should view with caution *ex parte* representations as to practice in a field as complex as this. Among other problems, it is easy to confuse bargaining retirement benefits for active employees and bargaining for retirees after their retirement. We have no doubt that some companies, as a matter of good labor relations policy, do discuss retiree benefits with the unions and some also make agreements or reach understandings relating to them, all on a voluntary and permissive basis without recognizing a mandatory obligation. Other companies on their own initiative make improvements from time to time in the benefit levels of retired workers.

In any event, the voluntary practices of some do not and should not form a legal basis for imposing a mandatory obligation on all.

The decision of the court below does not interfere with or inhibit the development of these voluntary arrangements. The fact that this issue of mandatory bargaining for retirees came before the Board for decision for the first time after the Act had been operative for almost 35 years suggests that the issue has not been a matter of great controversy in the past, and wisdom may suggest that the matter be left to the voluntary accommodations that appear to have worked so well up to now.

ARGUMENT

I.

BARGAINING UNDER THE ACT IS LIMITED TO EMPLOYEES OF THE EMPLOYER AND CONFINED TO THE APPROPRIATE BARGAINING UNIT

A. Under Section 8(a)(5) of the Act an Employer's Bargaining Obligation Is Limited to "His Employees"

Since the inception of the Act it has been clearly understood that mandatory bargaining is limited to employees of the employer and confined to units of employees established as appropriate for bargaining. We deal here with the first requirement.

It is difficult to conceive of any meaningful bargaining which does not revolve around the employer-employee relationship. Collective bargaining is an ongoing process and a mechanism for determining the wages, hours, and conditions under which persons are employed, and its purpose is to encourage the making of stabilizing agreements and minimize strikes and lockouts which would burden trade and commerce. While the benefits workers are to receive upon retirement are encompassed in the bargaining, it is recognized that these benefits are in the nature of deferred

wages for services currently being performed when the collective agreements are negotiated. To hold as the Board did that the mandatory bargaining relationship follows a worker into his retirement and that his benefits or deferred wages continue to be subject to mandatory renegotiation, *ad infinitum,* is a novel concept which we believe to be alien to the entire philosophy of collective bargaining as envisioned by Congress and as practiced in an industrial society.

Congress in constructing the collective bargaining provisions of the Act was careful to define the obligation in terms of the employer-employee relationship. Section 8(a)(5) provides:

> "Section 8(a) It shall be an unfair labor practice for an employer—
>
> * * *
>
> "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

The plain language on 8(a)(5) limiting the employers bargaining obligation to "his employees", as we shall show, is reenforced and complemented by the provisions of Section 9 relating to the bargaining unit for which bargaining is required. Thus, for example, under Section 9(a), the bargaining representatives' exclusive bargaining authority is limited to the appropriate bargaining unit, and under Section 9(b), the largest unit that the Board can legally establish, (except that by consent of the parties only, a multiemployer unit may be established) is an employer unit.

The Board in its decision and brief places heavy reliance on the decision of this Court in *Phelps Dodge*

Corp. v. *NLRB,* 313 U.S. 177 (1941), arguing that the term "employee" is infinitely elastic and that wide discretion is given the Board to define the term on the basis of the "underlying economic facts."

This argument, however, has several flaws. The Court in *Phelps Dodge* was dealing with a case involving discrimination in hiring under Section 8(a)(3), where the broad generic definition of "employee" in Section 2(3) applied. But, in *Phelps Dodge,* the Court recognized that a different definition was applicable to the bargaining obligation. The Court pointed out that Section 2(3) contains a limiting phrase which makes the general definition inapplicable where "the Act explicitly states otherwise."

In specific reference to Section 8(5) [now 8(a)(5)], the Court said:

> "In determining whether an employer has refused to bargain collectively with representatives of 'his employees' in violation of Section 8(5) and Section 9(a), it is of course necessary to determine who constitute 'his employees.' One aspect of this is covered by Section 9(b) which provides for determination of the appropriate bargaining unit." 313 U.S. at 192.

Thus, the Court in *Phelps Dodge* by this statement made plain its understanding that the bargaining obligation in Section 8(a)(5) was not subject to the generic definition of 2(3) but was limited to employees of the particular employer and also to the bargaining unit as determined under Section 9.

The Board itself has recognized that Section 8(a)(5) incorporates a restrictive meaning of the term "em-

ployee." In *Page Aircraft Maintenance, Inc.*, 123 NLRB 159, 163, n. 5 (1959), the Board said:[3]

> "We do not regard as controlling for purposes of determining for whom an employer must bargain those cases cited . . . which hold that the anti-discrimination provisions of Section 8(a)(3), (4), and (b)(2) of the Act forbid discrimination against applicants for employment. The anti-discrimination provisions refer to 'employee' *generally,* whereas, unlike those provisions, Section 8(a)(5) contains specific language requiring an employer to bargain for '*his* employees'." (emphasis in original)

The Board made the same distinction in *Briggs Mfg. Co.*, 75 NLRB 569 (1947) and in *Piasecki Aircraft,* 123 NLRB 348 (1959). The decision in *Piasecki* was enforced by the Third Circuit court with this statement:

> "It [the Board] recognized the distinction in Section 8(a)(5) wherein an employer is required to bargain in good faith with representatives of '*his employees*' and held that the Bellanca workers were not his [Piasecki's] employees within the meaning of that Section." *Piasecki Aircraft Corporation* v. *NLRB,* 280 F. 2d 575, 589 (1960) (emphasis in original).

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[3] The Board in its brief below argued that *Page* had been overruled by the Board in *Chemrock Corporation,* 151 NLRB 1074 (1965). *Chemrock* was a case where the Board held that a successor employer taking over a going enterprise was obligated to take over the predecessor's employees and on-going bargaining relationship. The Board overruled *Page* only to the extent it conflicted with the *Chemrock* decision. 151 NLRB at 1080, n. 8. The court below considered *Chemrock* and found that it dealt with "facts and issues entirely different from those present here" (A. 193, n. 12).

Until this case arose, neither the Board or any court has questioned this interpretation of Section 8(a)(5) or claimed that an employer was obligated by law to negotiate for persons who are not "his employees" and not a part of the unit for bargaining as defined in Section 9(a). As we shall later argue, the Board's primary argument here—that, even if retirees are not employees, and not in the bargaining unit, there nevertheless exists a mandatory obligation to renegotiate their retirement benefits—is at war with this well-established principle.

B. Mandatory Bargaining Under the Act Is Confined to Established Bargaining Units

In further limitation on the bargaining obligation, the Act mandates that bargaining will be conducted in well-defined units found appropriate for bargaining under Section 9 of the Act.

Section 8(a)(5) of the Act is made subject to Section 9(a).

Section 9(a) provides:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . ."

Section 9(a), therefore, imposes the added condition that for employees to be covered by the bargaining obligation they must be "in" or a part of a unit of employees found appropriate for the purposes of collective bargaining under that Section.

The Board and courts have held that the scope of the bargaining unit limits the extent of the bargaining obligation, and, as a necessary corollary, an employer is under no duty of, nor does the union have any right to compel, bargaining for persons or employees not within the unit appropriate for bargaining purposes. See, e.g., *Food Store Employees Union, Local 347* v. *NLRB,* 422 F. 2d 685, 688-689 (C.A.D.C. 1969); *Local 1325, Retail Clerks* v. *NLRB,* 414 F. 2d 1194, 1205 (C.A.D.C. 1969); *NLRB* v. *Campbell Sons' Corp.,* 407 F. 2d 969, 975-979 (C.A. 4, 1969); *NLRB* v. *Solis Theatre Corp.,* 403 F. 2d 381, 382-383 (C.A. 2, 1968); *NLRB* v. *Sandy's Stores, Inc.,* 398 F. 2d 268, 271-273 (C.A. 1, 1968); *Colecraft Mfg. Co.* v. *NLRB,* 385 F. 2d 998, 1005-1008 (C.A. 2, 1967); *Eastern Greyhound Lines* v. *NLRB,* 337 F. 2d 84 (C.A. 6, 1964); *Ainsworth Mfg. Co.,* 131 NLRB 273, 48 LRRM 1029 (1961).

The Court in *United Mine Workers* v. *Pennington,* 381 U.S. 657, 666 (1965), took note of the Board's rule that bargaining was confined to the bargaining unit, and held that it is the duty of the parties to bargain "unit by unit" and on no other basis.

In *Douds* v. *International Longshoremen's Assn.,* 241 F. 2d 278 (C.A. 2, 1957), the Court found a union in violation of the Statute by demanding bargaining for employees outside the unit certified by the Board. The Court concluded that the unit as certified by the Board could be changed only by further action of the Board or agreement of the parties and that it was impermissible for "one party over the objection of the other [to demand] a change in that unit." 241 F. 2d at 283.

The District of Columbia Circuit held in *I.L.A.* v. *NLRB,* 277 F. 2d 681 (C.A.D.C. 1960), that "while the

present certification remains outstanding it should control the legality of the bargaining process." 277 F. 2d at 682. See also, *Electrical Workers Union, Local 59,* 119 NLRB 1792, 41 LRRM 1392 (1958), *enf'd, NLRB* v. *IBEW,* 266 F. 2d 349 (C.A. 5, 1959), and *District 50, United Mine Workers,* 142 NLRB 930, 53 LRRM 1178 (1963).

The positioning of retired people in or out of the appropriate unit is therefore crucial to this case. For, if they are not a part of the bargaining unit under Section 9(a), there is no mandatory obligation, or right to bargain for them under Section 8(a)(5).

The reason for the nexus between Section 8(a)(5) and Section 9(a) is plain. The composition of the bargaining unit controls the legality and scope of the bargaining and the eventual agreement. The subject matter for bargaining are the wages, hours, and conditions of the unit employees. Within that range, the bargaining has a wide scope, but the employees on behalf of whom the bargaining is conducted and the agreement made are those employees who have been established as members of an appropriate unit for bargaining. The bargaining covers only those employees and no others, and the same is true of the agreement as well. That has been the uniform practice since the inception of the Act.

In this structure, the employer's bargaining obligation is coextensive with the bargaining agent's authority. The bargaining agent's authority as exclusive representative is a very special status under the law. It is limited to the bargaining unit for it is the members of that unit who by majority voice, generally in a secret ballot election, have selected that union as their exclusive bargaining agent. Within that unit the employer

must deal with the union as representative and with no other, but the bargaining agent's authority as exclusive representative is bound by the confines of the unit. The restriction of the representative's authority to the unit which elects it is an essential element of industrial democracy and employee rights as guaranteed by the Act.

II.

INDIVIDUALS WHO HAVE PERMANENTLY RETIRED ARE NOT EMPLOYEES AND NOT WITHIN THE BARGAINING UNIT

The pertinent inquiry under the Statute is, in our view, solely a question of whether retirees after their retirement can fairly be said to be employees of this employer and members of the appropriate bargaining unit.[4]

We think it clear that permanent retirees do not meet these tests.

A. Retirees Are Not "Employees" of the Employer

As the court below found, retirement at this plant is a complete and final severance of employment. Upon retirement, employees are removed from the payroll and union seniority lists. Thereafter, they perform no services, are in no way under the control of the Company, earn no wages, are under no restrictions as to other employment or activities, and have no right or expectation of reemployment.

The Board did not find that retirees meet any of the normal indicia of employees, and, in fact, concedes that

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[4] We dispute the Board's claim of unilateral modification by the Company of an agreement on retiree medical insurance. The Company did not cancel or modify its agreement, but merely gave the retirees an additional option. If they wished to continue the medical insurance as per the agreement they were at liberty to do so, and most of them did.

when an employee retires "most of the threads which once bound him to the unit are severed . . ." (A. 34). This is clearly so. Upon retirement, the individual generally loses all contact with his place of employment and either goes into another job or business or finds a suitable place for his retirement. Moreover, in these times of optional early retirement, more and more persons upon retirement from one company find other gainful employment. The retired person no longer has any interest in wages, hours, or conditions in his former place of employment. Even under the most liberal test, he cannot be considered an employee of his former employer.

The Board, however, expresses the view that the retiree needs representation, and therefore argues that the term "employee" is elastic enough to be stretched to cover him to meet this social need.

The Board attempts to support its opinion by various analogies.

The Board argues—by analogy to applicants for employment, economic strikers, persons on military leave, hiring hall arrangements, persons on layoff status and the like—that coverage of the Act is not limited to employees currently in an active work status. This, of course, is true for certain purposes.

But, these analogies are not apt or persuasive on the specific issue here. These are all familiar situations in which the persons involved have either been unlawfully deprived of employment, have a normal expectancy of resuming active employment by reason of their retention of seniority in the unit, or a legal right under this Act or some other statute to maintain their employee status and reemployment rights. Thus, Section 8(a)

(3) protects the applicant for employment against discrimination, *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177 (1941); Section 2(3) expressly continues the employee status of economic strikers; and the Selective Service Act protects reemployment rights of persons in military service. The hiring hall case involved a situation where seniority rights and job preferences were established for a multi-employer group through a common source. Clearly, the conditions on which men were referred from job to job among the members of the multi-employer group was a mandatory bargaining subject. *NLRB* v. *Houston Chapter, Associated General Contractors,* 349 F. 2d 449 (C.A. 5, 1965), *cert. denied* 382 U.S. 1026. The successorship case was one in which the Board held that a successor employer succeeded to the bargaining obligation of its predecessor. *Chemrock Corp.,* 151 NLRB 1074 (1965). The recognition picketing case is not in point and is expressly covered by Section 8(b)(7) of the Act. *NLRB* v. *Local 542, International Union of Operating Engineers,* 331 F. 2d 99 (C.A. 3, 1964), *cert. denied,* 379 U.S. 889.

The court below considered these categories of cases and found them wholly inapposite. As the court said:

> "It is true that for many purposes the Act extends protection to persons not currently serving employers. However, by plain meaning an employer has no statutory duty to bargain collectively with respect to persons who are not 'his employees'." (A. 191-192).

As already noted, the Board itself has recognized this same distinction. *Page Aircraft,* 123 NLRB 159 (1959); *Piasecki Aircraft,* 123 NLRB 348 (1959), *enf'd.,* 280 F. 2d 575 (C.A. 3, 1960), *cert. denied,* 364 U.S. 933; *Briggs Mfg. Co.,* 75 NLRB 569 (1947).

The Board goes even further afield to find analogies for its expansive definition of "employee."

Citing three Court of Appeals decisions under Section 302 of another title of the Act, the Board asserts that in the light of these decisions it would lead to an anomaly to hold that retirees are not employees for bargaining purposes. *Blassie* v. *Kroger Company,* 345 F. 2d 58 (C.A. 8, 1965); *Teamsters* v. *Townsend,* 345 F. 2d 77 (C.A. 8, 1965); and *Garvison* v. *Jensen,* 355 F. 2d 487 (C.A. 9, 1966).

This is essentially a makeweight argument. What these decisions basically hold is that retired employees may under some circumstances be beneficiaries of trusts established for the benefit of employees and their dependents pursuant to certain exceptions to the provisions of Section 302 of Title III of the Act.

It would be an anomaly, indeed, if this were not so. But, these interpretations of a relatively obscure and narrow-purpose provision in another and separate title of the Act can provide no meaningful guide to the interpretation of so major a part of the Act as the provisions which establish the bargaining obligation.

Turning to the three Court of Appeals decisions, they all relate to an interpretation of Section 302, which is a criminal provision making it a misdemeanor for an employer to make payment to a union representing his employees. The Section makes an exception, however, where the payments are made into a jointly-administered trust fund for the benefit of employees. Two of the three Court of Appeals decisions dealt with certain aspects of the meaning of the term "employee" as used in this special context. No issue of collective bargaining was involved.

The Board has to a degree misconstrued the rulings. They do not hold that retirees are employees in any general sense. *Blassie* only holds that "a person for whom employer contributions are made prior to retirement is not barred from receiving benefits of the Trust after retirement . . ." 345 F. 2d at 68.

Garvison holds that an employer may continue to contribute to a trust for the benefit of an employee after his retirement. *Townsend* does not deal with the definition of an employee at all.

The administration of a trust is a fiduciary responsibility to be carried out in accordance with the terms of the trust instrument. This function is entirely separate and distinct from the negotiation of collective bargaining agreements and the representation of employees for bargaining purposes. The speculative difficulties which the Board's brief projects in separating and distinguishing these two wholly separate functions simply do not exist. These cases hold that it is permissive for an employer to make payments into these jointly administered trusts. They do not deal with mandatory bargaining at all.

To hold that the interpretation of Section 302 crosses over and controls the definition of the bargaining obligation under Section 8(a)(5) would, itself, be an anomaly, as the court below found.[5]

The Board relies on *NLRB* v. *Hearst*, 322 U.S. 111 (1944) to support its claim of virtually unrestrained discretion in interpreting the term "employee." In *Hearst*, the issue was whether newsboys were independ-

[5] There is likewise no persuasive parallel in the Internal Revenue Service view that a benefit plan may cover former as well as present employees.

ent contractors or employees, and the Court upheld the Board's ruling that they were employees. However, the Court, while finding that discretion was vested in the Board to depart to a degree from traditional common law concepts of master and servant, nevertheless held that the Board's application of the definition must be consistent with the Act's "terms and purposes." The Court also held that the Board's determination of employee status must have "warrant in the record," and a "reasonable basis in law." Here, we submit, the Board's attempt to hold retirees to be employees for bargaining purposes fits neither the terms nor the purposes of the Act nor has any reasonable basis on the record or in law.

Moreover, the Congress has since disapproved the broad sweep given to the term "employee" by the Board in *Hearst*.

House Report 245 on the Taft-Hartley Amendments in 1947, specifically criticized the Board's *Hearst* decision and the expansive interpretation given to the term "employees." While this was in the context of the employee-independent contractor controversy, the intent of Congress was to restrict the Board from extending the definition beyond the commonly accepted understanding of the term.

The Report states:

> "But in the case of *National Labor Relations Board* v. *Hearst* . . . the Board expanded the definition of the term 'employee' beyond anything that it had ever included before, and the Supreme Court, relying on the theoretic 'expertness' of the Board, upheld the Board . . . It must be presumed that when Congress passed the Labor Act, it intended words to have the meanings that they had

> when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there has always been a difference, and a big difference, between 'employees' and 'independent contractors.' *'Employees' work for wages or salaries* . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, *Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings.''* H.R. 245 on H.R. 3020, 1 Legislative History of the Taft-Hartley Act 309 (G.P.O. 1948) (emphasis supplied)

The Conference Report followed the House in restricting the Board's definition of "employee."[6]

Clearly, the *Hearst* decision deals with a wholly different situation, and particularly in view of its subsequent history in Congress, provides no support for the Board's claim of virtually unreviewable powers to de-

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[6] Thus, in *NLRB* v. *Steinberg & Co.*, 182 F.2d 850, 854-855 (C.A. 5, 1950), the Court of Appeals commented on this legislative history as follows:

> ". . . the term 'employee' is not defined in the National Labor Relations Act, and the authorities have been at variance in the past as to the 'test' to be applied in determining whether or not an employment relationship exists under this and similar remedial legislative acts. However, the legislative history of the Taft-Hartley Law . . . shows quite clearly that when Congress passed the Labor Act it intended the word 'employee' to mean *someone who works for another for hire* and this clear expression of Congressional intent we are obligated to follow." (emphasis supplied)

This view has been expressly approved by two other circuits. *Site Oil Company of Missouri* v. *NLRB*, 319 F.2d 86, 93 (C.A. 8, 1963); *National Van Lines Inc.* v. *NLRB*, 273 F.2d 402, 403-404 (C.A. 7, 1960).

fine the term "employee" in a context wholly removed from the narrow issues surrounding the distinction between independent contractor and employee.

B. Retirees Are Not Members of the Bargaining Unit

The Board has uniformly excluded permanent retirees from all bargaining units and from voting in the election of a bargaining agent. In so doing, the Board has expressed doubts as to their employee status but grounded their exclusion primarily on the lack of community of interest with current employees. *Public Service Corporation of New Jersey,* 72 NLRB 224 (1947); *W. D. Byron & Sons,* 55 NLRB 172 (1944); *J. S. Young Co.,* 55 NLRB 1174 (1944). The Board's rationale was spelled out in *Public Service Corporation* as follows:

> "We have considerable doubt as to whether or not pensioners are employees within the meaning of Section 2(3) of the Act, since they no longer perform any work for the Employers, and have little expectancy of resuming their former employment. In any event, even if pensioners were considered as employees, we believe they lack a substantial community of interest with employees who are presently in the active service of the Employers." 72 NLRB at 229-230.

In this plant and in this very unit, which the Board first established and certified in 1949, and recertified in 1970, the Board included in the unit only those employees working on hourly rates, and, as the court below found, this operated to exclude retirees who were made ineligible and did not vote in the election to select the unit representative. While the Board has regularized procedures for amending and clarifying bargaining units, it has not attempted to act to re-

vise the certification to include retirees and has no intention of doing so. On the contrary, at a subsequent representation election in the same bargaining unit held on November 11, 1970, the Board again excluded retirees.

Presumably, the Board intends no change in this exclusionary policy since the Board's brief reaffirms the Board's long-standing position that retirees lack a sufficient community of interest with active employees to be included in their units or vote in Board elections (Board Brief, pp. 24-25).

In an attempt to rationalize its position, the Board appears to consider retirees as a sort of dangling appendage to the bargaining unit, not in it but not wholly detached from it. This approach does not square with anything in the statute.

The Board has, it appears, created a paradox. For, as Member Zagoria aptly stated:

> ". . . if an employee has sufficient interests to be included in the unit, he should be given a voice in the selection of a bargaining representative; if he is not given such voice, he should not be included in the unit." (A. 50).

We submit that the exclusion of retirees from the bargaining unit is, in and of itself, dispositive of this case. For, as the structure of the Act and the Board and court cases we have cited show, the bargaining unit controls the extent of the mandatory bargaining obligation.

If this were not so, chaos would be injected in the bargaining process, and the laudable objectives of Congress in defining bargaining units and mandatory bar-

gaining in those units would be lost. Unions could, and doubtless would, seek to use the bargaining unit as a convenient springboard from which to project and extend their bargaining authority outside and beyond the units they have been designated to represent.

III

THE BOARD'S "INTEREST" BARGAINING ARGUMENT IS CONTRARY TO THE ACT

The Board's primary contention in its brief is that bargaining for retirees is mandatory, regardless of the lack of employee status or unit membership, because their retirement benefits "vitally affects active bargaining unit employees (A. 38)."

The vice of this argument is that it seeks to cast aside the unit bargaining concept around which the bargaining obligation is structured and has developed in practice. As we have already shown, the Board and the courts have uniformly held up to now that the bargaining unit defines the boundaries of the bargaining obligation and controls the scope of the bargaining. Within the bargaining unit, the parties are required to bargain on a wide range of subjects and are permitted to bargain on a still wider range. But, the issue here is not subject matter, but scope, and the identity of the employee group for which the bargain is being made and to whom it will apply. What the Union seeks here is to demand bargaining authority to represent retirees and bargain their benefits for them. This the Act does not countenance, as the cases we have cited uniformly hold.

In its brief to the Court of Appeals, the Board conceded that "an employer is under no duty to bar-

gain for employees not within the bargaining unit." That concession was a correct statement of the prevailing law. In its brief before this Court, however, the Board now argues that the bargaining obligation encompasses "individuals outside the unit." (Board Brief, p. 13.)

This argument proves far too much. Its adoption would spell the end of the statutory concept of "unit by unit" bargaining which the court endorsed in *U.M.W.* v. *Pennington,* 381 U.S. 657 (1965). It would, as the court below found, inject an element of uncertainty in the scope of the bargaining agent's exclusive authority and lead to countless bargaining disputes. It would also give virtually limitless scope to the classes of persons for whom bargaining would be demanded and arguably required.

The Board appears to argue that control over retiree benefits by the representative of the active employees is required in order to protect their own interest in bargaining their own benefits. The court below found, however, that:

> "It is not necessary to extend the bargaining obligation to persons already retired in order to insure current employees the right to negotiate through their bargaining representative their own retirement benefits to take effect after their retirement." (A. 198).

As the court also pointed out, the current employees can negotiate binding safeguards to protect their retirement benefits and to assure that they will be administered and paid in accord with the terms and intent of their agreements. Given their collective economic strength and their statutory right to demand

bargaining on their own retirement benefits and on legally binding commitments that they be paid after retirement, there is simply no showing that active employees need have control over bargaining for retirees after they have retired in order to effectively bargain for and safeguard their own retirement benefits.

The Board makes several contentions designed to show that bargaining would be more meaningful and the prospect of agreement enhanced if the bargaining encompassed retirees (Board Brief, p. 18). We seriously question this statement, since it is more likely that broadening the scope of controversy and attempting to reopen and renegotiate the benefits with which employees have retired would tend to exacerbate the controversy and lead to many more bargaining deadlocks and disputes.

In deciding that bargaining for retirees was required, the Board expressed two primary but inconsistent concerns. One was that employees upon retirement would be "cast aside and forgotten" (A. 34). The other was that to the extent to which an employer voluntarily increases benefits for retirees, funds available for wages and benefits for active employees would be siphoned off (A. 39).

With respect to the first concern, the court below correctly held that prior to retirement, employees could bargain retirement benefits and obtain contract safeguards to guarantee their payment (A. 198).

With respect to the second concern, the court aptly pointed out that, while it was true that improvements in retiree benefits by the employer affected "the availability of funds available for active employees," this

was also true of a host of other employee expenditures such as wages and salaries paid non-union employees. However, the court held that this does not grant the unit representative authority to bargain the wages and salaries of other employees or supervisors or negotiate the amounts to be spent in dividends, capital expenditures, and the like (A. 198).

The Board argues in its brief that retiree benefits are regarded as a part of direct labor costs while the other types of expenditures mentioned by the court below are not so regarded. This is a highly questionable distinction since all available employer funds necessarily come from the same common source.

The Board also argues that active and retired employees are often covered by the same insurance contract, and that in some unexplained fashion the extension of mandatory bargaining to retirees is necessary to allow the use of a combined insurance plan. This is, of course, incorrect. Many company pension and medical plans cover both union represented and non-represented employees, and retirees and there is nothing in the court's decision that would alter or prohibit the continuance of such combined plans.

The same argument is made with respect to the funding of pension plans. There is no impediment to unions and employers periodically reviewing the funding of such plans to insure sufficient funding of benefits for active employees when they retire. In so doing they can take into account demands on the fund to pay benefits to persons already retired. This can be done without renegotiating these retiree benefits and is not affected by the decision of the court below.

The thrust of the Board's argument, that the benefits of persons already retired and future retirement benefits for current employees are inseparable, and must be treated as one for bargaining purposes, is simply contrary to the fact. There is no practical difficulty involved in fully negotiating retirement benefits for active employees without reaching back in time and renegotiating the benefits of those who have previously retired.

The Board cites the decisions of the Court in *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964) and *Teamsters* v. *Oliver,* 358 U.S. 283 (1959) to support its argument that mandatory bargaining can extend to bargaining for employees or other persons.

It is obvious, of course, that an agreement negotiated on behalf of the members of an appropriate unit can have an "effect" on persons outside that unit. All agreements limiting or prohibiting contracting out of unit work are in this category. But there are limitations on this when the unit representative goes beyond the legitimate objective of preserving work for the unit it represents. This *Oliver* type agreement is held justified because it is made on behalf of unit employees and is designed to protect *their* jobs from erosion by contracting out. But this is quite a different matter than claiming exclusive bargaining authority to negotiate *for* persons outside the unit.

Fibreboard and *Oliver* were both subcontracting cases and treated as such by the Court. In *Fibreboard,* all of the unit work was contracted out without prior notice to the union, and in *Oliver* part of the unit work of drivers was contracted out to owner-

drivers, thus curtailing *pro tanto* the job opportunities of the employee drivers. The clause in *Oliver* establishing the minimum rental to be paid owner-drivers was clearly designed to have the effect of reducing the economic incentive for contracting out unit work.

In neither *Fibreboard* nor *Oliver* did the Court hold that the unit representative's authority as exclusive bargaining agent encompassed bargaining for and on behalf of and entering into agreements for and on behalf of employees or other persons outside the unit which the representative was designated to represent.

A second important distinction is that, unlike the subcontractor employees in *Fibreboard* and the owner-drivers in *Oliver,* persons in permanent retirement do not compete in any way for unit work and in no way threaten the jobs or wage security of the active unit employees, or, for that matter, hamper to any degree their ability to negotiate their wages, hours, conditions, or retirement benefits. There can be no real doubt that, given their ability to shut down operations by a strike and their consequent superior bargaining leverage, the active unit employees can and do protect and advance their own bargaining interests on their own, and do not need to have control over the renegotiation of benefits for past pensioners in order to safeguard those interests.

The Board acknowledged this in its petition to the Court when it said:

> "To be sure, the union can negotiate a retirement plan for active employees alone and protect itself against breaches of that plan." (Board Petition for certiorari, p. 9.)

IV

THE REACH OF THE BOARD'S HOLDING IS NOT CLEAR AND THE HOLDING RAISES SERIOUS QUESTIONS WHICH THE BOARD DOES NOT ANSWER

Neither the Board's decision nor its brief attempt to define the limits of the decision or to answer the serious questions that will inevitably arise from this significant departure from the unit bargaining principle.

But these issues cannot be brushed aside as hypothetical, as the Board did in its decision and before the court below, for the Court is entitled to know the intended scope of the Board's ruling. It is the responsibility of the Board to provide a degree of certainty and stability, rather than inject confusion in the collective bargaining relationship.

Some of these issues were raised by Member Zagoria, and others flow logically from the grounds advanced for the Board's decision.

Left unsettled, but certain to arise, are such questions as:

(1) the right of retirees to select a separate representative, to institute a rival union petition or a decertification petition;

(2) the right of retirees to vote in representation elections;

(3) the right of retirees to vote in union elections and on ratification of labor agreements;

(4) the effect on retirees of a change in unit representative after their retirement;

(5) the question of whether the unit representative can demand a reduction in retiree benefits and strike for such a demand;

(6) whether the unit representative can demand pensions and benefits for employees not eligible for benefits when they left their jobs;

(7) the extent of a unit representative's authority to represent and bargain for various other classes of employees outside the bargaining unit; and

(8) the status of retirees under a union-security agreement and their obligation to pay dues.

It is to be anticipated that these and other issues stemming from the Board's decision would be spawned and create controversies which will occupy the Board and the courts for some time to come.

The Board's decision also raises a disturbing question as to its effect on the finality of agreements.

Clearly, what the Board is saying is that, after an employee has retired with the bundle of benefits which have been negotiated on his behalf and no longer is performing any work or services for his former employer, his benefits can be renegotiated again and again, without limitation. And these demands for renegotiation can be backed up by strikes or threats of strikes by the current employees. This, we submit, places an unfair burden on the employer.

The Act contemplates that the determination of the wages and benefits representing the mutually agreed upon value of an employee's services shall be made at the time these services are being performed. While payment of a part of the total wage and benefit package may be deferred until after retirement, the determination of the total value should not be subject to reopening after the employee has retired. At the time of performance of the employee's services, the

parties can best determine their value in the context of the current economic facts of the business and the wage and benefit levels then extant. It would be increasingly difficult for employers to operate their businesses in the face of such a wide-open contingent wage cost liability.

This inequity was referred to by both Member Zagoria and by the court below. The court said:

> "Once retirement benefits have been bargained for, earned, and become payable, the employer may not recant on his contractual obligation to pay them. Section 301, Labor-Management Relations Act, 1947, 29 U.S.C. § 185(a) (1964) . . . Changing economic facts relating to the employer's business or the general economy occurring after an employee retires cannot enhance or depreciate the value of his prior services or justify periodic post-retirement negotiations. The employer cannot retroactively increase his prices to compensate for these increased benefits, or fund expenses which are, as these would be, open-ended." (A. 199-200).

It must be recognized that there are limits to the ability of a private employer to escalate indefinitely retirement programs already costing large sums to provide protection against economic inflation. This employer has from time to time voluntarily, and within the limits of its available resources, upgraded benefits for thousands of retirees under a variety of plans at different locations. These private plans are generally recognized as valuable supplements to governmental programs financed by the economy as a whole, such as social security and Medicare. But, the larger share of the burden of an inflationary economy can only be

shouldered as a part of the general tax burden in which all corporations and citizens share. The unspoken premise of the Board decision that a larger share of this burden should fall on the individual employer has led the Board to seek by a tortured construction of the Act to impose a mandatory bargaining obligation to achieve what it considers a desirable social goal. While the goal of better security for retired persons is laudable, it is questionable whether the Board's ruling would advance that goal. In any event, the Board can not amend the Act to accommodate the Board's view of social need.

V

INDUSTRY PRACTICE WAS NOT MADE A PART OF THE RECORD AND CONSTITUTES NO USEFUL GUIDE

The Union and Employer *amici* disagree as to the extent of industry practice in permissively negotiating changes in benefits for retirees. We point out that the various representations made as to industry practice are all *ex parte,* and there is no evidence in the record whatsoever on this score. Thus, while we do not question the good faith of the statements, we do believe that if industry practices were to be given any weight, they should have been explored and clarified in an evidentiary hearing.

The references to industry practices in the various briefs are not definitive and reliance upon them is hazardous, and especially so because of the wide range of practices that exist and because of the lack of definitiveness in the terms "discuss", "bargain" and "negotiate." We know from long personal experience that these terms have different meanings to different persons in different contexts, and they do not always

express a common meaning. Some employers as a matter of labor relation policies discuss many matters with their unions and reach various mutual understandings with them on a wide variety of subjects. They do not consider these talks, discussions and understandings as bargaining or negotiating, and they do not consider that these voluntary actions and arrangements flow from any mandatory requirement of law.

It is easy to confuse much of this practice with negotiation. But there is a vast difference in permissively and voluntarily undertaking to achieve mutual understandings on labor matters on a broad front and in accepting a mandatory bargaining obligation and all the consequences that flow therefrom. What is done permissively and voluntarily is subject to limitation and to some measure of discretion on both sides. These discussions which are handled permissively and voluntarily can be carried on informally and in an atmosphere of mutual freedom from legal restraints.

But mandatory bargaining for retirees is a wholly different matter. If bargaining is mandatory, all matters pertaining to these benefits, as the Board's decision here illustrates, must be bargained and the issue can be used to deadlock agreement overall and lead to strikes and lockouts.

The development of voluntary arrangements between employers and unions, as the court below said, is to be encouraged, but any rule of construction that uses the voluntary practices of some as a ground for fashioning a mandatory requirement for all would obviously inhibit the development of voluntary practices

in other areas of labor-management relations. Moreover, as the court below also said,

> "This voluntary practice demonstrates the increasingly humanitarian quality of the labor-management relationship, and is to be encouraged. However, it does not form a basis on which this Court can alter the statutory language, or undermine the Congressional intent." (A. 200).

CONCLUSION

The Judgment of the Court of Appeals should be sustained.

Respectfully submitted,

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APPENDIX

APPENDIX

Labor-Management Relations Act, 1947, as amended (29 U.S.C. §§ 152, 158-159), consisting of:

Definitions

SEC. 2. When used in this Act—

* * *

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Unfair Labor Practices

SEC. 8(a). It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

Representatives and Elections

SEC. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority

of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

SEC. 9(b). The Board shall decide in each case whether, in order to assure the employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: . . . .

Sec. 9(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to

him a claim to be recognized as the representative defined in section 9(a);

The Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

Syllabus

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1 *v.* PITTSBURGH PLATE GLASS CO., CHEMICAL DIVISION, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 70-32. Argued October 20, 1971—Decided December 8, 1971*

A labor organization which was the exclusive bargaining agent for employees "working" on hourly pay rates at one of respondent Company's facilities had negotiated with the Company an employee health insurance plan in which retired employees participated. Upon enactment of Medicare the Union sought mid-term bargaining to renegotiate the insurance benefits for retired employees. The Company, maintaining that Medicare made the insurance program useless and that retirees' benefits were not a mandatory subject of collective bargaining, stated that it would offer each retiree a stated monthly amount toward supplemental Medicare coverage. When, despite Union objections, the Company made the offer, the Union filed unfair labor practice charges with the National Labor Relations Board (NLRB). The NLRB concluded that the Company was guilty of unfair labor practices in violation of §§ 8 (a) (5) and (1) of the National Labor Relations Act (NLRA) and issued a cease-and-desist order. The NLRB held that the benefits of already retired employees were a mandatory subject of bargaining as "terms and conditions of employment" of the retirees themselves and, alternatively, of the active bargaining unit employees. It also held that the Company's "establishment of a fixed, additional option in and of itself changed the negotiated plan of benefits" contrary to §§ 8 (d) and 8 (a) (5) of the Act. The Court of Appeals for the Sixth Circuit disagreed with the NLRB and refused to enforce its cease-and-desist order. *Held:*

1. Retirees' benefits are not, within the meaning of §§ 8 (a) (5) and 8 (d) of the NLRA, a mandatory subject of bargaining as "terms and conditions of employment" of the retirees. Pp. 163–176.

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* *Together with No. 70-39, *National Labor Relations Board* v. *Pittsburgh Plate Glass Co., Chemical Division, et al.*, also on certiorari to the same court.

(a) The collective-bargaining obligation extends only to the "terms and conditions of employment" of the employer's "employees," and the term "employee" has its ordinary meaning, *i. e.*, someone who works for another for hire, which excludes retirees. Pp. 165–171.

(b) The collective-bargaining obligation is limited to the "terms and conditions of employment" of the "employees" in the bargaining unit appropriate for the purpose of collective bargaining. Retirees were not members of the unit represented by the Union, because they were no longer "working." Nor could they be members, since they lack a substantial community of interests with the active employees in the unit. Pp. 171–175.

(c) Even if an industry practice of bargaining over retirees' rights exists, which is disputed, that cannot change the law and make into bargaining unit "employees" those who are not. Pp. 175–176.

2. Retirees' benefits are not a mandatory subject of bargaining as "terms and conditions of employment" of the active employees remaining in the bargaining unit, although their own future retirement plans are. Retirees' benefits do not "vitally" affect the "terms and conditions of employment" of current employees. The benefits that active workers may reap by including retired employees under the same health insurance contract as themselves are speculative and insubstantial at best. The relationship that the NLRB asserted exists between bargaining in behalf of retirees and the negotiation of active employees' retirement plans is equally too speculative a foundation on which to base an obligation to bargain. Pp. 176–182.

3. Even if the Company's offering the retirees an exchange for their withdrawal from the already negotiated health insurance plan was a unilateral mid-term "modification" of the plan within the meaning of § 8 (d) of the Act, which is disputed, it did not constitute an unfair labor practice, since it related to a permissive rather than a mandatory subject of bargaining. Pp. 183–188.

427 F. 2d 936, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., dissented.

Mortimer Riemer argued the cause for petitioner in No. 70–32. With him on the brief was *Lawrence M.*

Oberdank. *Norton J. Come* argued the cause for petitioner in No. 70–39. With him on the brief were *Solicitor General Griswold, Richard B. Stone, Arnold Ordman, Dominick L. Manoli,* and *Nancy M. Sherman.*

Guy Farmer argued the cause for respondents in both cases. With him on the brief was *Nicholas R. Criss, Jr.*

Briefs of *amici curiae* urging reversal were filed by *J. Albert Woll, Laurence Gold, Thomas E. Harris,* and *Stephen I. Schlossberg* for the American Federation of Labor and Congress of Industrial Organizations et al., and by *Harold Edgar, David H. Marlin,* and *Robert J. Mozer* for the National Council of Senior Citizens.

Briefs of *amici curiae* urging affirmance were filed by *Milton A. Smith, Lawrence M. Cohen,* and *Gerard C. Smetana* for the Chamber of Commerce of the United States; by *Lambert H. Miller* and *Richard D. Godown* for the National Association of Manufacturers of the United States; and by *William C. Treanor* and *John W. Whittlesey* for Union Carbide Corp.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Under the National Labor Relations Act, as amended, mandatory subjects of collective bargaining include pension and insurance benefits for active employees,[1] and an employer's mid-term unilateral modification of such benefits constitutes an unfair labor practice.[2] This cause

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[1] See, *e. g., NLRB* v. *Black-Clawson Co.*, 210 F. 2d 523 (CA6 1954) (dictum); *NLRB* v. *General Motors Corp.*, 179 F. 2d 221 (CA2 1950); *W. W. Cross & Co.* v. *NLRB*, 174 F. 2d 875 (CA1 1949); *Inland Steel Co.* v. *NLRB*, 170 F. 2d 247 (CA7 1948).

[2] See, *e. g., NLRB* v. *Scam Instrument Corp.*, 394 F. 2d 884 (CA7 1968). Cf., *e. g., NLRB* v. *Huttig Sash & Door Co.*, 377 F. 2d 964 (CA8 1967); *C & S Industries, Inc.*, 158 N. L. R. B. 454 (1966). See also *NLRB* v. *Katz*, 369 U. S. 736 (1962).

presents the question whether a mid-term unilateral modification that concerns, not the benefits of active employees, but the benefits of already retired employees also constitutes an unfair labor practice. The National Labor Relations Board, one member dissenting, held that changes in retired employees' retirement benefits are embraced by the bargaining obligation and that an employer's unilateral modification of them constitutes an unfair labor practice in violation of §§ 8 (a)(5) and (1) of the Act. 71 L. R. R. M. 1433 (1969).[3] The Court of Appeals for the Sixth Circuit disagreed and refused to enforce the Board's cease-and-desist order, 427 F. 2d 936 (1970). We granted certiorari, 401 U. S. 907 (1971). We affirm the order of the Court of Appeals.

I

Since 1949, Local 1, Allied Chemical and Alkali Workers of America, has been the exclusive bargaining representative for the employees "working" on hourly rates of pay at the Barberton, Ohio, facilities of respondent Pittsburgh Plate Glass Company.[4] In 1950, the Union and the Company negotiated an employee group health insurance plan, in which, it was orally agreed, retired employees could participate by contributing the required

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[3] The Board has since adhered to its decision in: *Union Carbide Corp.-Linde Div.*, 76 L. R. R. M. 1585 (1971); *Westinghouse Electric Corp*, 76 L. R. R. M. 1451 (1971); *Union Carbide Corp.*, 75 L. R. R. M. 1548 (1970); and *Hooker Chemical Corp.*, 75 L. R. R. M. 1357 (1970).

[4] The Labor Board's direction of election described the bargaining unit as: "all employees of the Employer's plant and limestone mine at Barberton, Ohio, *working* on hourly rates, including group leaders who *work* on hourly rates of pay, but excluding salaried employees and supervisors . . . ." (Emphasis supplied.) The Union was recertified in 1970, after the Board's decision in this cause, with the same unit description embracing only employees working on hourly rates.

premiums, to be deducted from their pension benefits. This program continued unchanged until 1962, except for an improvement unilaterally instituted by the Company in 1954 and another improvement negotiated in 1959.

In 1962 the Company agreed to contribute two dollars per month toward the cost of insurance premiums of employees who retired in the future and elected to participate in the medical plan. The parties also agreed at this time to make 65 the mandatory retirement age. In 1964 insurance benefits were again negotiated, and the Company agreed to increase its monthly contribution from two to four dollars, applicable to employees retiring after that date and also to pensioners who had retired since the effective date of the 1962 contract. It was agreed, however, that the Company might discontinue paying the two-dollar increase if Congress enacted a national health program.

In November 1965, Medicare, a national health program, was enacted, 79 Stat. 291, 42 U. S. C. § 1395 *et seq.* The 1964 contract was still in effect, and the Union sought mid-term bargaining to renegotiate insurance benefits for retired employees. The Company responded in March 1966 that, in its view, Medicare rendered the health insurance program useless because of a non-duplication-of-benefits provision in the Company's insurance policy, and stated, without negotiating any change, that it was planning to (a) reclaim the additional two-dollar monthly contribution as of the effective date of Medicare; (b) cancel the program for retirees; and (c) substitute the payment of the three-dollar monthly subscription fee for supplemental Medicare coverage for each retired employee.[5]

[5] Hospital benefits under Medicare are provided automatically to any social security annuitant 65 or over. Medical benefits are optional and, at the relevant time period, required a monthly three-dollar payment per person.

The Union acknowledged that the Company had the contractual right to reduce its monthly contribution, but challenged its proposal unilaterally to substitute supplemental Medicare coverage for the negotiated health plan. The Company, as it had done during the 1959 negotiations without pressing the point, disputed the Union's right to bargain in behalf of retired employees, but advised the Union that upon further consideration it had decided not to terminate the health plan for pensioners. The Company stated instead that it would write each retired employee, offering to pay the supplemental Medicare premium if the employee would withdraw from the negotiated plan. Despite the Union's objections the Company did circulate its proposal to the retired employees, and 15 of 190 retirees elected to accept it. The Union thereupon filed unfair labor practice charges.

The Board held that although the Company was not required to engage in mid-term negotiations, the benefits of already retired employees could not be regarded as other than a mandatory subject of collective bargaining. The Board reasoned that "retired employees are 'employees' within the meaning of the statute for the purposes of bargaining about changes in their retirement benefits . . . ." 71 L. R. R. M., at 1435. Moreover, "retirement status is a substantial connection to the bargaining unit, for it is the culmination and the product of years of employment." *Id.*, at 1436. Alternatively, the Board considered "bargaining about changes in retirement benefits for retired employees" as "within the contemplation of the statute because of the interest which active employees have in this subject . . . ." *Id.*, at 1435. Apparently in support of both theories, the Board noted that "[b]argaining on benefits for workers already retired is an established aspect of current labor-management relations." *Id.*, at 1439. The Board also held that the

Company's "establishment of a fixed, additional option in and of itself changed the negotiated plan of benefits" contrary to §§ 8 (d) and 8 (a)(5) of the Act. *Id.*, at 1441. Accordingly, the Company was ordered to cease and desist from refusing to bargain collectively about retirement benefits and from making unilateral adjustments in health insurance plans for retired employees without first negotiating in good faith with the Union. The Company was also required to rescind, at the Union's request, any adjustment it had unilaterally instituted and to mail and post appropriate notices.[6]

II

Section 1 of the National Labor Relations Act declares the policy of the United States to protect commerce "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment . . . ." 49 Stat. 449, as amended, 29 U. S. C. § 151. To effectuate this policy, § 8 (a)(5) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section" 9 (a), 49 Stat. 453, as amended, 29 U. S. C. § 158 (a)(5). Section 8 (d), in turn, defines "to bargain

[6] The Board found that the Company had violated not only § 8 (a)(5) but § 8 (a)(1), and the Board framed its cease-and-desist order accordingly. Section 8 (a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" § 7, which include "the right to self-organization . . . [and] to bargain collectively through representatives of their own choosing . . . ." 49 Stat. 452, as amended, 29 U. S. C. §§ 158 (a)(1), 157. However, the § 8 (a)(1) violation derives from the alleged § 8 (a)(5) misconduct and, therefore, presents no separate issues.

collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." 61 Stat. 142, 29 U. S. C. § 158 (d). Finally, § 9 (a) declares: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." 49 Stat. 453, as amended, 29 U. S. C. § 159 (a).

Together, these provisions establish the obligation of the employer to bargain collectively, "with respect to wages, hours, and other terms and conditions of employment," with "the representatives of his employees" designated or selected by the majority "in a unit appropriate for such purposes." This obligation extends only to the "terms and conditions of employment" of the employer's "employees" in the "unit appropriate for such purposes" which the union represents. See, *e. g.*, *Mine Workers* v. *Pennington*, 381 U. S. 657, 666 (1965); *NLRB* v. *Borg-Warner Corp.*, 356 U. S. 342 (1958); *Packard Co.* v. *NLRB*, 330 U. S. 485 (1947); *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 192 (1941) (dictum); *Pittsburgh Glass Co.* v. *NLRB*, 313 U. S. 146 (1941). The Board found that benefits of already retired employees fell within these constraints on alternative theories. First, it held that pensioners are themselves "employees" and members of the bargaining unit, so that their benefits are a "term and condition" of their employment.[7]

[7] The Court of Appeals below seems to have read the Board's decision as holding that retirees might be considered "employees"

The Court of Appeals, in contrast, held "that retirees are not 'employees' within the meaning of section 8 (a) (5) and . . . the Company was under no constraint to collectively bargain improvements in their benefits with the Union." 427 F. 2d, at 942. The court reasoned, *first*, "[r]etirement with this Company, as with most other companies, is a complete and final severance of employment. Upon retirement, employees are completely removed from the payroll and seniority lists, and thereafter they perform no services for the employer, are paid no wages, are under no restrictions as to other employment or activities, and have no rights or expectations of reemployment," *id.*, at 944; and, *second*, "[i]t has repeatedly been held that the scope of the bargaining unit controls the extent of the bargaining obligation . . . . [And] the unit certified by the Board as appropriate was composed . . . only of presumably active employees . . . ." *Id.*, at 945. For the reasons that follow we agree with the Court of Appeals.

First. Section 2 (3) of the Act provides:

> "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . ." 49 Stat. 450, as amended, 29 U. S. C. § 152 (3).

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under the Act, but not as finding that the retirees in this case were. See 427 F. 2d, at 944 n. 14. We do not read the Board's decision that way. The Board said: "For the reasons stated above, the 'underlying economic facts' of this case persuade us that Congress intended to confer employee status on retired employees with respect to health insurance plans affecting them." 71 L. R. R. M., at 1437.

We have repeatedly affirmed that the task of determining the contours of the term "employee" "has been assigned primarily to the agency created by Congress to administer the Act." *NLRB* v. *Hearst Publications*, 322 U. S. 111, 130 (1944). See also *Iron Workers* v. *Perko*, 373 U. S. 701, 706 (1963); *NLRB* v. *Atkins & Co.*, 331 U. S. 398 (1947). But we have never immunized Board judgments from judicial review in this respect. "[T]he Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *NLRB* v. *Hearst Publications*, *supra*, at 131.

In this cause we hold that the Board's decision is not supported by the law. The Act, after all, as § 1 makes clear, is concerned with the disruption to commerce that arises from interference with the organization and collective-bargaining rights of "workers"—not those who have retired from the work force. The inequality of bargaining power that Congress sought to remedy was that of the "working" man, and the labor disputes that it ordered to be subjected to collective bargaining were those of employers and their active employees. Nowhere in the history of the National Labor Relations Act is there any evidence that retired workers are to be considered as within the ambit of the collective-bargaining obligations of the statute.

To the contrary, the legislative history of § 2 (3) itself indicates that the term "employee" is not to be stretched beyond its plain meaning embracing only those who work for another for hire. In *NLRB* v. *Hearst Publications*, *supra*, we sustained the Board's finding that newsboys were "employees" rather than independent contractors. We said that "the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as 'employee,' . . . leaves no doubt that its applicability is to be determined broadly, in

doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications." The term "employee" "must be understood with reference to the purpose of the Act and the facts involved in the economic relationship." 322 U. S., at 129. Congress reacted by specifically excluding from the definition of "employee" "any individual having the status of an independent contractor." The House, which proposed the amendment, explained:

> "*An 'employee,' according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, . . . means someone who works for another for hire.* But in the case of *National Labor Relations Board* v. *Hearst Publications, Inc.* . . . , the Board . . . held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees.' The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors.' *'Employees' work for wages or salaries under direct supervision.* . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary

meanings." H. R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947) (emphasis added).

See also 93 Cong. Rec. 6441–6442; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 32–33 (1947).

The 1947 Taft-Hartley revision made clear that general agency principles could not be ignored in distinguishing "employees" from independent contractors. *NLRB* v. *United Insurance Co.*, 390 U. S. 254, 256 (1968). Although *Hearst Publications* was thus repudiated, we do not think its approach has been totally discredited. In doubtful cases resort must still be had to economic and policy considerations to infuse § 2 (3) with meaning. But, as the House comments quoted above demonstrate, this is not a doubtful case. The ordinary meaning of "employee" does not include retired workers; retired employees have ceased to work for another for hire.

The decisions on which the Board relied in construing § 2 (3) to the contrary are wide of the mark. The Board enumerated "unfair labor practice situations where the statute has been applied to persons who have not been initially hired by an employer or whose employment has terminated. Illustrative are cases in which the Board has held that applicants for employment and registrants at hiring halls—who have never been hired in the first place—as well as persons who have quit or whose employers have gone out of business are 'employees' embraced by the policies of the Act." 71 L. R. R. M., at 1436 (citations omitted). Yet all of these cases involved people who, unlike the pensioners here, were members of the active work force available for hire and at least in that sense could be identified as "employees." No decision under the Act is cited, and none to our knowledge exists, in which an individual who has ceased work without expectation of further employment has been held to be an "employee."

The Board also found support for its position in decisions arising under § 302 (c)(5) of the Labor Management Relations Act, 61 Stat. 157, 29 U. S. C. § 186 (c)(5). Section 302 prohibits, *inter alia*, any payment by an employer to any representative of any of his employees. Subsection (c)(5) provides an exemption for payments to an employee trust fund established "for the sole and exclusive benefit of the employees of such employer" and administered by equal numbers of representatives of the employer and employees. The word "employee," as used in that provision, has been construed to include "current employees and persons who were . . . current employees but are now retired." *Blassie* v. *Kroger Co.*, 345 F. 2d 58, 70 (CA8 1965).[8] The Board considered that it would be anomalous to hold "that retired employees are not 'employees' whose ongoing benefits are fit subject of bargaining under Section 8 (a)(5), while under [§ 302 (c)] they are 'employees' for the purpose of administering the same health insurance benefits. It would create the further anomaly that a union would not be entitled to act as the representative of retired employees under Section 8 (a)(5), while subject to an explicit statutory duty to act as their representative under [§ 302 (c)]." 71 L. R. R. M., at 1437.[9]

Yet the rationale of *Blassie* is not at all in point. The question there was simply whether under § 302 (c)(5) retirees remain eligible for benefits of trust funds estab-

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[8] See also *Garvison* v. *Jensen*, 353 F. 2d 487 (CA9 1966); *Local No. 688, Int'l Bro. of Teamsters* v. *Townsend*, 345 F. 2d 77 (CA8 1965). Section 501 (3) of the Labor Management Relations Act provides that the term "employee" as used in that legislation has the same meaning as when used in the National Labor Relations Act. 61 Stat. 161, 29 U. S. C. § 142 (3).

[9] Although the Board referred to § 302 (b) rather than § 302 (c), it is clear from the context of the Board's discussion that the latter citation was the one intended.

lished during their active employment. The conclusion that they do was compelled by the fact that the contrary reading of the statute would have made illegal contributions to pension plans, which the statute expressly contemplates in subsections (A) and (C).[10] No comparable situation exists in this case. Furthermore, there is no anomaly in the conclusion that retired workers are "employees" within § 302 (c)(5) entitled to the benefits negotiated while they were active employees, but are not "employees" whose ongoing benefits are embraced by the bargaining obligation of § 8 (a)(5). Contrary to the Board's assertion, the union's role in the administration of the fund is of a far different order from its duties as collective-bargaining agent. To accept the Board's reasoning that the union's § 302 (c)(5) responsibilities dictate the scope of the § 8 (a)(5) collective-

[10] Section 302 (c)(5) provides an exemption:

"with respect to money or other thing of value paid to a trust fund established by such [employee] representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents . . . : *Provided*, That (A) such payments are held in trust for the purpose of paying . . . for the benefit of employees, their families and dependents, for medical or hospital care, *pensions on retirement or death of employees*, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; . . . and (C) *such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities . . .*" (Emphasis supplied.)

The express reference to pensions in subsections (A) and (C) requires that the phrase "for the sole and exclusive benefit of the employees of such employer" in the introductory clause to § 302 (c)(5) be read to include retirees.

bargaining obligation would be to allow the tail to wag the dog.[11]

Second. Section 9 (a) of the Labor Relations Act accords representative status only to the labor organization selected or designated by the majority of employees in a "unit appropriate" "for the purposes of collective bargaining." Section 9 (b) goes on to direct the Labor Board to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ." 49 Stat. 453, as amended, 29 U. S. C. § 159 (b). We have always recognized that, in making these determinations, the Board is accorded broad discretion. See *NLRB* v. *Hearst Publications*, 322 U. S., at 132–135; *Pittsburgh Glass Co.* v. *NLRB*, 313 U. S. 146 (1941). Moreover, the Board's findings of fact, if supported by substantial evidence, are conclusive. National Labor Relations Act, § 10 (e), 49 Stat. 454, as amended, 29 U. S. C. § 160 (e). But the Board's powers in respect of unit determinations are not without limits, and if its

[11] The Board adds an argument in its brief for construing "employee" in §§ 302 (c) (5) and 8 (a) (5) *in pari materia*. Not to read the term that way, the Board contends, "would frequently interject into welfare plan negotiations the troublesome threshold question whether particular proposals involved the administration of the written agreement, in which case the union would be entitled to represent retired employees, or its renegotiation, in which case . . . it would not." However, nothing we hold today precludes permissive bargaining over the benefits of already retired employees. Moreover, to the extent that "the troublesome threshold question" posited by the Board may arise, it is no different from the task of distinguishing the distinct functions of contract application and contract negotiation which employers and labor organizations are already accustomed to addressing.

decision "oversteps the law," *Packard Co.* v. *NLRB*, 330 U. S., at 491, it must be reversed.

In this cause, in addition to holding that pensioners are not "employees" within the meaning of the collective-bargaining obligations of the Act, we hold that they were not and could not be "employees" included in the bargaining unit. The unit determined by the Board to be appropriate was composed of "employees of the Employer's plant . . . working on hourly rates, including group leaders who work on hourly rates of pay . . . ." Apart from whether retirees could be considered "employees" within this language, they obviously were not employees "working" or "who work" on hourly rates of pay. Although those terms may include persons on temporary or limited absence from work, such as employees on military duty, it would utterly destroy the function of language to read them as embracing those whose work has ceased with no expectation of return.

In any event, retirees could not properly be joined with the active employees in the unit that the Union represents. "As a standard, the Board must comply . . . with the requirement that the unit selected must be one to effectuate the policy of the act, the policy of efficient collective bargaining." *Pittsburgh Glass Co.* v. *NLRB*, *supra*, at 165. The Board must also exercise care that the rights of employees under § 7 of the Act "to self-organization . . . [and] to bargain collectively through representatives of their own choosing" are duly respected. In line with these standards, the Board regards as its primary concern in resolving unit issues "to group together only employees who have substantial mutual interests in wages, hours, and other conditions of employment." 15 NLRB Ann. Rep. 39 (1950). Such a mutuality of interest serves to assure the coherence among employees necessary for efficient collective bargaining and at the same time to prevent a function-

ally distinct minority group of employees from being submerged in an overly large unit. See *Kalamazoo Paper Box Corp.*, 136 N. L. R. B. 134, 137 (1962).

Here, even if, as the Board found, active and retired employees have a common concern in assuring that the latter's benefits remain adequate, they plainly do not share a community of interests broad enough to justify inclusion of the retirees in the bargaining unit. Pensioners' interests extend only to retirement benefits, to the exclusion of wage rates, hours, working conditions, and all other terms of active employment. Incorporation of such a limited-purpose constituency in the bargaining unit would create the potential for severe internal conflicts that would impair the unit's ability to function and would disrupt the processes of collective bargaining. Moreover, the risk cannot be overlooked that union representatives on occasion might see fit to bargain for improved wages or other conditions favoring active employees at the expense of retirees' benefits.[12]

But we need not rely on our own assessment of the probable consequences of including retirees in the bargaining unit to conclude that the resulting unit would

[12] The Board argues in its brief that retirees will be at a greater disadvantage if they are required to bargain individually with the employer than if they are represented by the union. The argument assumes that collective bargaining over the benefits of already retired employees would be a one-way street in their favor. The assumption, however, is not free from doubt, as the Board itself recognized in its opinion, see 71 L. R. R. M., at 1440, in declining to take a position on the question. Compare *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711 (1945), adhered to on rehearing, 327 U. S. 661 (1946), with § 9 (a) of the National Labor Relations Act. In any event, in representing retirees in the negotiation of retirement benefits, the union would be bound to balance the interests of all its constituents, with the result that the interests of active employees might at times be preferred to those of retirees. See Recent Developments, 68 Mich. L. Rev. 757, 766–767, 772–773 (1970).

be inappropriate. The Board itself has previously recognized that retirees do not have a sufficient interest to warrant participation in the election of a collective-bargaining agent. In *Public Service Corp. of New Jersey*, 72 N. L. R. B. 224, 229–230 (1947), for example, the Board stated:

> "We have considerable doubt as to whether or not pensioners are employees within the meaning of Section 2 (3) of the Act, since they no longer perform any work for the Employers, and have little expectancy of resuming their former employment. In any event, even if pensioners were to be considered as employees, we believe that they lack a substantial community of interest with the employees who are presently in the active service of the Employers. Accordingly, we find that pensioners are ineligible to vote in the election." [13]

The Board argues, however, that the pensioners' ineligibility to vote is not dispositive of their right to membership in the bargaining unit, since the franchise and the right to membership depend upon different levels of interest in the unit.[14] Yet in *W. D. Byron & Sons of Maryland, Inc.*, 55 N. L. R. B. 172, 174–175 (1944), which the Board found controlling in *Public Service Corp. of New Jersey*, see 72 N. L. R. B., at 230 n. 10, the Board not merely held ineligible to vote, but expressly

[13] See also *J. S. Young Co.*, 55 N. L. R. B. 1174 (1944). The Board indicates in its brief that it adheres to these decisions. Indeed, we are informed by the Company that the Board excluded retirees from the representation election that it conducted following its decision in this case. See n. 4, *supra*.

[14] The Board on that theory at one time withheld the right to vote from certain employees who were, nonetheless, acknowledged unit members. See, *e. g.*, *H. P. Wasson & Co.*, 105 N. L. R. B. 373 (1953). However, that policy was subsequently abandoned. See *Post Houses, Inc.*, 161 N. L. R. B. 1159, 1160 n. 1, 1172 (1966).

excluded from the bargaining unit pensioners who had little expectation of further employment. In any event, it would be clearly inconsistent with the majority rule principle of the Act to deny a member of the unit at the time of an election a voice in the selection of his bargaining representative.[15] The Board's own holdings thus compel the conclusion that a unit composed of active and retired workers would be inappropriate.

Third. The Board found that bargaining over pensioners' rights has become an established industrial prac-

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[15] Section 7 of the Act declares that "[e]mployees shall have the right . . . to bargain collectively through representatives of their own choosing . . . ." Section 9 (a), in turn, provides that "[r]epresentatives designated or selected . . . by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit . . . ." The majority rule principle that the Act thus establishes was adopted after considerable public controversy. Both the House and the Senate committees that reported out the Wagner bill were at pains to explain that the principle not only was necessary for the effective functioning of collective bargaining but was sanctioned by the philosophy of democratic institutions. Moreover, they carefully reviewed the provisions that the Act establishes to protect minority groups within the bargaining unit, such as the prohibition on discrimination in favor of union members. See H. R. Rep. No. 972, 74th Cong., 1st Sess., 18–20 (1935); S. Rep. No. 573, 74th Cong., 1st Sess., 13–14 (1935). The language of §§ 7 and 9 (a), coupled with this legislative history, makes plain that all unit members are enfranchised.

This is not to say that the Board is without power to develop reasonable regulations governing who may vote in Board-conducted elections. The House committee expressly indicated that the Board may "make and publish appropriate rules governing the conduct of elections and determining who may participate therein." H. R. Rep. No. 972, *supra*, at 20. Thus, the Board may, for example, withhold the ballot from employees hired after the election eligibility date. As Member Zagoria explained in his dissent from the Board's decision below, that rule "provides an administrative cutoff date for convenience in conducting elections, and to prevent payroll padding and other possible abuses." 71 L. R. R. M., at 1441.

tice. But industrial practice cannot alter the conclusions that retirees are neither "employees" nor bargaining unit members. The parties dispute whether a practice of bargaining over pensioners' benefits exists and, if so, whether it reflects the views of labor and management that the subject is not merely a convenient but a mandatory topic of negotiation.[16] But even if industry commonly regards retirees' benefits as a statutory subject of bargaining, that would at most, as we suggested in *Fibreboard Corp.* v. *NLRB*, 379 U. S. 203, 211 (1964), reflect the interests of employers and employees in the subject matter as well as its amenability to the collective-bargaining process; it would not be determinative. Common practice cannot change the law and make into bargaining unit "employees" those who are not.

III

Even if pensioners are not bargaining unit "employees," are their benefits, nonetheless, a mandatory subject of collective bargaining as "terms and conditions of employment" of the active employees who remain in the unit? The Board held, alternatively, that they are, on the ground that they "vitally" affect the "terms and conditions of employment" of active employees principally by influencing the value of both their current and future benefits. 71 L. R. R. M., at 1438.[17] The Board ex-

[16] The Company also contends that the record is barren of any evidence to support the Board's findings on industry experience. Even if that is the case, the evidence cited by the Board may have properly been officially noticed. But we need not decide that question in view of our conclusion that the industrial practice that the Board found to exist does not validate its holdings.

[17] The additional interests that the Board found active employees have in pensioners' benefits were properly dealt with by the Court of Appeals below and do not need extended consideration here. The Board stated that "the Union and current employees have a legitimate interest in assuring that negotiated retirement benefits

plained: "It is not uncommon to group active and retired employees under a single health insurance contract with the result that . . . it is the size and experience of the entire group which may determine insurance rates." *Ibid.* Consequently, active employees may "benefit from the membership of retired employees in the group whose participation enlarges its size and might thereby lower costs per participant." *Ibid.* Furthermore, the actual value of future benefits depends upon contingencies, such as inflation and changes in public law, which the parties cannot adequately anticipate and over which they have little or no control. By establishing a practice of repre-

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are in fact paid and administered in accordance with the terms and intent of their contracts . . . ." 71 L. R. R. M., at 1438. That interest is undeniable. But Congress has specifically established a remedy for breaches of collective-bargaining agreements in § 301 of the Labor Management Relations Act. 61 Stat. 156, 29 U. S. C. § 185. See, *e. g., Upholsterers' Int'l Union* v. *American Pad & Textile Co.*, 372 F. 2d 427 (CA6 1967). Similarly, Congress has expressly provided for employee representation in the administration of trust funds under § 302 (c)(5) of that Act. In any event, the question presented is not whether retirement rights are enforceable, but whether they are subject to compulsory bargaining.

The Board also noted "that changes in retirement benefits for retired employees affect the availability of employer funds for active employees." 71 L. R. R. M., at 1438. That, again, is quite true. But countless other employer expenditures that concededly are not subjects of mandatory bargaining, such as supervisors' salaries and dividends, have a similar impact. The principle that underlies the Board's argument sweeps with far too broad a brush. The Board does suggest in its brief that pensioners' benefits are different from other employer expenses because they are normally regarded as part of labor costs. The employer's method of accounting, however, hardly provides a suitable basis for distinction. In any case, the impact on active employees' compensation from changes in pensioners' benefits is, like the effect discussed in the text of including retirees under the same health insurance plan as active employees, too insubstantial to bring those changes within the collective-bargaining obligation.

senting retired employees in resolving those contingencies as they arise, active workers can insure that their own retirement benefits will survive the passage of time. This, in turn, the Board contends, facilitates the peaceful settlement of disputes over active employees' pension plans. The Board's arguments are not insubstantial, but they do not withstand careful scrutiny.

Section 8 (d) of the Act, of course, does not immutably fix a list of subjects for mandatory bargaining. See, *e. g., Fibreboard Corp.* v. *NLRB, supra,* at 220–221 (STEWART, J., concurring); *Richfield Oil Corp.* v. *NLRB,* 97 U. S. App. D. C. 383, 389–390, 231 F. 2d 717, 723–724 (1956). But it does establish a limitation against which proposed topics must be measured. In general terms, the limitation includes only issues that settle an aspect of the relationship between the employer and employees. See, *e. g., NLRB* v. *Borg-Warner Corp.,* 356 U. S. 342 (1958). Although normally matters involving individuals outside the employment relationship do not fall within that category, they are not wholly excluded. In *Teamsters Union* v. *Oliver,* 358 U. S. 283 (1959), for example, an agreement had been negotiated in the trucking industry, establishing a minimum rental that carriers would pay to truck owners who drove their own vehicles in the carriers' service in place of the latter's employees. Without determining whether the owner-drivers were themselves "employees," we held that the minimum rental was a mandatory subject of bargaining, and hence immune from state antitrust laws, because the term "was integral to the establishment of a stable wage structure for clearly covered employee-drivers." *United States* v. *Drum,* 368 U. S. 370, 382–383, n. 26 (1962).[18] Similarly,

[18] Specifically, we noted in *Oliver,* 358 U. S., at 294:

"[The collective bargaining agreement constitutes] . . . a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the . . . contract. The

in *Fibreboard Corp.* v. *NLRB*, *supra*, at 215, we held that "the type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining . . . ." As we said there, *id.*, at 213, "the work of the employees in the bargaining unit was let out piecemeal in *Oliver*, whereas here the work of the entire unit has been contracted out."

The Board urges that *Oliver* and *Fibreboard* provide the principle governing this case. The Company, on the other hand, would distinguish those decisions on the ground that the unions there sought to protect employees from outside threats, not to represent the interests of third parties. We agree with the Board that the principle of *Oliver* and *Fibreboard* is relevant here; in each case the question is not whether the third-party concern is antagonistic to or compatible with the interests of bargaining-unit employees, but whether it vitally affects the "terms and conditions" of their employment.[19] But we disagree with the Board's assessment of the significance of a change in retirees' benefits to the "terms and conditions of employment" of active employees.

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inadequacy of a rental which means that the owner makes up his excess costs from his driver's wages not only clearly bears a close relation to labor's efforts to improve working conditions but is in fact of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service."

[19] This is not to say that application of *Oliver* and *Fibreboard* turns only on the impact of the third-party matter on employee interests. Other considerations, such as the effect on the employer's freedom to conduct his business, may be equally important. See *Fibreboard Corp.* v. *NLRB*, *supra*, at 217 (STEWART, J., concurring). But we have no occasion in this case to consider what, if any, those considerations may be.

The benefits that active workers may reap by including retired employees under the same health insurance contract are speculative and insubstantial at best. As the Board itself acknowledges in its brief, the relationship between the inclusion of retirees and the overall insurance rate is uncertain. Adding individuals increases the group experience and thereby generally tends to lower the rate, but including pensioners, who are likely to have higher medical expenses, may more than offset that effect. In any event, the impact one way or the other on the "terms and conditions of employment" of active employees is hardly comparable to the loss of jobs threatened in *Oliver* and *Fibreboard*. In *Fibreboard*, after holding that "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" is a mandatory subject of bargaining, we noted that our decision did "not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy." 379 U. S., at 215. The inclusion of retirees in the same insurance contract surely has even less impact on the "terms and conditions of employment" of active employees than some of the contracting activities that we excepted from our holding in *Fibreboard*.

The mitigation of future uncertainty and the facilitation of agreement on active employees' retirement plans, which the Board said would follow from the union's representation of pensioners, are equally problematical. To be sure, the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining. Moreover, provisions of those plans to guard against future contingencies are equally subsumed under the collective-bargaining obligation. Under the Board's

theory, active employees undertake to represent pensioners in order to protect their own retirement benefits, just as if they were bargaining for, say, a cost-of-living escalation clause. But there is a crucial difference. Having once found it advantageous to bargain for improvements in pensioners' benefits, active workers are not forever thereafter bound to that view or obliged to negotiate in behalf of retirees again.[20] To the contrary, they are free to decide, for example, that current income is preferable to greater certainty in their own retirement benefits or, indeed, to their retirement benefits altogether. By advancing pensioners' interests now, active employees, therefore, have no assurance that they will be the beneficiaries of similar representation when they retire. The insurance against future contingencies

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[20] Since retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer. Nothing in *Railroad Trainmen* v. *Howard*, 343 U. S. 768 (1952), is to the contrary. In *Howard* we held that a union may not use the powers accorded it under law for the purposes of racial discrimination even against workers who are not members of the bargaining unit represented by the union. The reach and rationale of *Howard* are a matter of some conjecture. See Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151, 157–159 (1957). But whatever its theory, the case obviously does not require a union affirmatively to represent nonbargaining unit members or to take into account their interests in making bona fide economic decisions in behalf of those whom it does represent.

This does not mean that when a union bargains for retirees—which nothing in this opinion precludes if the employer agrees—the retirees are without protection. Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. See generally Note, 70 Col. L. Rev. 909, 916–920 (1970). The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed. See *Smith* v. *Evening News Assn.*, 371 U. S. 195, 200–201 (1962); *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459, 470 (1960).

that they may buy in negotiating benefits for retirees is thus a hazardous and, therefore, improbable investment, far different from a cost-of-living escalation clause that they could contractually enforce in court. See n. 20, *supra*. We find, accordingly, that the effect that the Board asserts bargaining in behalf of pensioners would have on the negotiation of active employees' retirement plans is too speculative a foundation on which to base an obligation to bargain.

Nor does the Board's citation of industrial practice provide any ground for concluding otherwise. The Board states in its brief that "[n]either the bargaining representative nor the active employees . . . can help but recognize that the active employees of today are the retirees of tomorrow—indeed, such a realization undoubtedly underlies the widespread industrial practice of bargaining about benefits of those who have already retired . . . and explains the vigorous interest which the Union has taken in this case." But accepting the Board's finding that the industrial practice exists, we find nowhere a particle of evidence cited showing that the explanation for this lies in the concern of active workers for their own future retirement benefits.

We recognize that "classification of bargaining subjects as 'terms [and] conditions of employment' is a matter concerning which the Board has special expertise." *Meat Cutters* v. *Jewel Tea*, 381 U. S. 676, 685–686 (1965). The Board's holding in this cause, however, depends on the application of law to facts, and the legal standard to be applied is ultimately for the courts to decide and enforce. We think that in holding the "terms and conditions of employment" of active employees to be *vitally* affected by pensioners' benefits, the Board here simply neglected to give the adverb its ordinary meaning. Cf. *NLRB* v. *Brown*, 380 U. S. 278, 292 (1965).

IV

The question remains whether the Company committed an unfair labor practice by offering retirees an exchange for their withdrawal from the already negotiated health insurance plan. After defining "to bargain collectively" as meeting and conferring "with respect to wages, hours, and other terms and conditions of employment," § 8 (d) of the Act goes on to provide in relevant part that "where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract" except upon (1) timely notice to the other party, (2) an offer to meet and confer "for the purpose of negotiating a new contract or a contract containing the proposed modifications," (3) timely notice to the Federal Mediation and Conciliation Service and comparable state or territorial agencies of the existence of a "dispute," and (4) continuation "in full force and effect [of] . . . all the terms and conditions of the existing contract . . . until [its] expiration date . . . ." [21]

[21] Section 8 (d) reads in full:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract

The Board's trial examiner ruled that the Company's action in offering retirees a change in their health plan did not amount to a "modification" of the collective-bargaining agreement in violation of § 8 (d), since the pensioners had merely been given an additional option that they were free to accept or decline as they saw fit.

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of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

"The duties imposed upon employers, employees, and labor organizations by paragraphs (2)–(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159 (a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer." 29 U. S. C. § 158 (d).

The Board rejected that conclusion on the ground that there were several possible ways of adjusting the negotiated plan to the Medicare provisions and the Company "modified" the contract by unilaterally choosing one of them. The Company now urges, in effect, that we adopt the views of the trial examiner. We need not resolve, however, whether there was a "modification" within the meaning of § 8 (d), because we hold that even if there was, a "modification" is a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining.

Paragraph (4) of § 8 (d), of course, requires that a party proposing a modification continue "in full force and effect . . . all the terms and conditions of the existing contract" until its expiration. Viewed in isolation from the rest of the provision, that language would preclude any distinction between contract obligations that are "terms and conditions of employment" and those that are not. But in construing § 8 (d), "'we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 285 (1956) (quoting *United States* v. *Boisdoré's Heirs*, 8 How. 113, 122). See also *NLRB* v. *Lion Oil Co.*, 352 U. S. 282, 288 (1957). Seen in that light, § 8 (d) embraces only mandatory topics of bargaining. The provision begins by defining "to bargain collectively" as meeting and conferring "with respect to wages, hours, and other terms and conditions of employment." It then goes on to state that "the duty to bargain collectively shall also mean" that mid-term unilateral modifications and terminations are prohibited. Although this part of the section is introduced by a "proviso" clause, see n. 21, *supra*, it quite plainly is to be construed *in pari materia* with the preceding definition. Accordingly, just as § 8 (d) defines the obligation to bar-

gain to be with respect to mandatory terms alone, so it prescribes the duty to maintain only mandatory terms without unilateral modification for the duration of the collective-bargaining agreement.[22]

The relevant purpose of § 8 (d) that emerges from the legislative history of the Act together with the text of the provision confirms this understanding. The section stems from the 1947 revision of the Act, an important theme of which was to stabilize collective-bargaining agreements. The Senate bill, in particular, contained provisions in §§ 8 (d) and 301 (a) to prohibit unilateral mid-term modifications and terminations and to confer federal jurisdiction over suits for contract violations. See S. 1126, 80th Cong., 1st Sess., §§ 8 (d), 301 (a). The bill also included provisions to make it an unfair labor practice for an employer or labor organization "to violate the terms of a collective-bargaining agreement." *Id.*, §§ 8 (a)(6), 8 (b)(5). In conference the Senate's proposed §§ 8 (d) and 301 (a) were adopted with relatively few changes. See H. R. Conf. Rep. No. 510, *supra*, at 34–35, 65–66. The provisions to make contract violations an unfair labor practice, on the other hand, were rejected with the explanation that "[o]nce parties have made a collective bargaining contract the

[22] In coming to a contrary conclusion, the trial examiner mistakenly relied on *Brotherhood of Painters, Local Union No. 1385*, 143 N. L. R. B. 678 (1963), where the Board held that a union violated § 8 (d) by refusing to execute a written contract containing a permissive term to which it had previously agreed. "The parties did discuss the provision," the Board reasoned, "and for us to hold that the Employers in this case may not insist on the inclusion of this provision in their contract would upset, if not undo, the stabilizing effects of the agreement which was reached after several negotiation meetings." *Id.*, at 680. The union was required to sign the contract at the employers' request not because § 8 (d) reaches permissive terms, but because the union's refusal obstructed execution of an agreement on mandatory terms. Cf. *NLRB* v. *Katz*, *supra*, n. 2.

enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." *Id.*, at 42. The purpose of the proscription of unilateral mid-term modifications and terminations in § 8 (d) cannot be, therefore, simply to assure adherence to contract terms. As far as unfair-labor-practice remedies are concerned, that goal was to be achieved through other unfair-labor-practice provisions that were rejected in favor of customary judicial procedures. See *Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 510–513 (1962).

The structure and language of § 8 (d) point to a more specialized purpose than merely promoting general contract compliance. The conditions for a modification or termination set out in paragraphs (1) through (4) plainly are designed to regulate modifications and terminations so as to facilitate agreement in place of economic warfare. Thus, the party desiring to make a modification or termination is required to serve a written notice on the other party, offer to meet and confer, notify mediation and conciliation agencies if necessary, and meanwhile maintain contract relations. Accordingly, we think we accurately described the relevant aim of § 8 (d) when we said in *Mastro Plastics Corp.* v. *NLRB*, *supra*, at 284, that the provision "seeks to bring about the termination and modification of collective-bargaining agreements without interrupting the flow of commerce or the production of goods . . . ."

If that is correct, the distinction that we draw between mandatory and permissive terms of bargaining fits the statutory purpose. By once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining. When a proposed modification is to a permissive term, therefore, the purpose of facilitating accord on the proposal is not at all in point, since the parties are not

required under the statute to bargain with respect to it. The irrelevance of the purpose is demonstrated by the irrelevance of the procedures themselves of § 8 (d). Paragraph (2), for example, requires an offer "to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications." But such an offer is meaningless if a party is statutorily free to refuse to negotiate on the proposed change to the permissive term. The notification to mediation and conciliation services referred to in paragraph (3) would be equally meaningless, if required at all.[23] We think it would be no less beside the point to read paragraph (4) of § 8 (d) as requiring continued adherence to permissive as well as mandatory terms. The remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract, see n. 20, *supra*, not in an unfair-labor-practice proceeding.[24]

As a unilateral mid-term modification of a permissive term such as retirees' benefits does not, therefore, violate § 8 (d), the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE DOUGLAS dissents.

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[23] The notification required by paragraph (3) is "of the existence of a dispute." Section 2 (9) of the Act defines "labor dispute" to include "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment . . . ." 49 Stat. 450, as amended, 29 U. S. C. § 152 (9). Since controversies over permissive terms are excluded from the definition, a paragraph (3) notice might not be required in the case of a proposed modification to such a term even if § 8 (d) applied.

[24] It does not appear whether the collective-bargaining agreement involved in this cause provided for arbitration that would have been applicable to this dispute. We express no opinion, therefore, on the relevance of such a provision to the question before us.